(5)

No. 88-6546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 31, 1989
CERTIORARI GRANTED APRIL 24, 1989

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 84-2107PHX WPC

ALBERT DURO,
Petitioner,

-vs-

EDWARD REINA, Chief of Police, Salt River Department of Public Safety (of the Salt River Pima-Maricopa Indian Community); and the HONORABLE RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS AND/OR FOR A WRIT OF PROHIBITION

Filed November 8, 1984

ALBERT DURO petitions this Court for a Writ of Habeas Corpus and/or Writ of Prohibition against Respondents.

I. *The Parties.*

1. The petitioner, Albert Duro, is a citizen of the United States. He was born in Riverside, California and is a permanent resident of the State of California. His date of birth is 6/17/58.

2. Albert Duro is not a member of, nor is he eligible for membership in, the Salt River Pima-Maricopa Indian

Community. Membership within the Salt River Pima-Maricopa Indian Community is governed by Article II of its' Constitution and Chapter Two (Sections 2-1 through 2-5) of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, all of which is attached to this Petition and incorporated by reference as Exhibit A.

3. The Salt River Department of Public Safety is the police agency of and for the Salt River Pima-Maricopa Indian Community, which exists on and extends its authority over the Salt River Indian Reservation.

4. Edward Reina is the Chief of Police or chief officer of the Salt River Department of Public Safety. He has immediate custody over Albert Duro.

5. The Honorable Relman R. Manuel, Sr., is the Chief Judge of the Salt River Pima-Maricopa Indian Community Court.

6. The Salt River Indian Reservation was established by Executive Order dated June 14, 1879, which amended an earlier order of January 10, 1879. It established a reservation for the Pima and Maricopa Indians. The Executive Order of June 14, 1879, relating to the Salt River Indian Reservation and subsequent amendments thereto are attached to this petition and incorporated by reference as Exhibit B.

7. The Constitution and Code of the Salt River Pima-Maricopa Inidan Community was promulgated under the authority of the Indian Reorganization Act. See Title 25 United States Code § 476. Upon information and belief, no treaties exist between the United States and the Indians of the Salt River Community.

II. *Jurisdiction.*

This Court has jurisdiction over the persons and subject matter of this action pursuant to:

Article I, Section 8, Clause 3 of the United States Constitution;

Article I, Section 9, Clause 2 of the United States Constitution;

Title 28 U.S.C. Sections 2241(c)(1) and (3);

Title 25 U.S.C. Section 1303.

The Court is authorized to issue a writ of prohibition pursuant to Title 28 U.S.C. § 1651.

III. *The Facts.*

On or about the 19th day of June, 1984, Albert Duro was arrested near his home in the State of California by federal agents and charged with murder. He was subsequently removed to the District of Arizona and appeared before Magistrate Sitver on July 2, 1984. The "Criminal Complaint" filed against Albert Duro and Wendel Lackey is attached to this petition and incorporated by reference as Exhibit C.

8. The Grand Jury within the District of Arizona returned an indictment against Albert Duro on or about July 25, 1984, charging him with first degree murder in the death of Phillip Fernando Brown. The indictment is attached to this Petition and incorporated by reference as Exhibit D. It alleges that Albert Duro killed Phillip Fernando Brown within the confines of the "Pima-Salt River Indian Community, Indian Country" by means of a firearm on or about June 15, 1984.

9. Upon motion of the U.S. Government, the indictment against Albert Duro was dismissed without prejudice by order of the Honorable William P. Copple, Judge of the U.S. District Court, on September 17, 1984. The Order of Dismissal is attached to this Petition and incorporated by reference as Exhibit E. At the time of dismissal, the government indicated that it intended to reindict Mr. Duro after further investigation was completed.

10. The U.S. Marshal caused Mr. Duro to be held in custody after the dismissal of the indictment against him so that he could be turned over to the custody of tribal authorities for the Salt River Pima-Maricopa Indian Community. On September 19, 1984, Mr. Duro was placed in the custody of the Salt River Department of Public Safety and continues to be held by them within the confines of the Salt River Indian Reservation.

11. A "Criminal Complaint" against Albert Duro charging him with "Discharge of Firearms" was filed with the Salt River Pima-Maricopa Indian Community Court, dated June 18, 1984 (C.R. 84-0256). The complaint is attached to this petition and incorporated by reference as Exhibit F. The Salt River Pima-Maricopa Indian Community essentially charges that Albert Duro "discharged at least two (2) shots from a lever action rifle in the Victory Acres Area I" of the Reservation and that one of the shots killed a "14 year old boy". The criminal complaint (Exhibit D) and the federal indictment (Exhibit B) relate precisely to the same incident. The use or discharge of a firearm charged in both cases relates to the same act(s).

12. Phillip Fernando Brown, the "14 year old boy" named in the federal indictment (Exhibit D) and referred to in the criminal complaint of the tribe (Exhibit F) is an enrolled member of the Gila River Indian Tribe, which resides on a reservation separate and apart from the Salt River Indian Reservation. The certification of Indian blood relating to Phillip Fernando Brown is attached to this petition and incorporated by reference as Exhibit G.

13. A "Motion to dismiss" was filed with the tribal court in behalf of Albert Duro on October 4, 1984. The motion specifically argued that the Salt River Pima-Maricopa Indian Community Court did not have jurisdiction over Albert Duro, who is not a member of the Salt

River Pima-Maricopa Indian Community. The Motion to Dismiss is attached to this petition and incorporated by reference as Exhibit H. The question of jurisdiction raised by the Motion to Dismiss was premised upon federal, rather than tribal law.

14. The "Prosecutor for the Salt River Pima-Maricopa Indian Community" filed an "Answer to Motion to Dismiss" on or about October 12, 1984, which is attached to this petition and incorporated by reference as Exhibit I. The Answer to Motion to Dismiss essentially relied upon federal, rather than tribal law to support its ultimate conclusion with respect to jurisdiction.

15. Counsel for both parties argued the Motion to Dismiss before the Salt River Pima-Maricopa Indian Community Court on October 15, 1984. No evidence was presented by either party.

16. The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over "any person otherwise subject to the jurisdiction of the Salt River Court." See Section 4-1(c) of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit J.

17. The Honorable Relman R. Manuel, Sr., Chief Judge of the Salt River Pima-Maricopa Indian Community Court, issued a "Ruling on Motion to Dismiss" on October 19, 1984, which is attached to this petition and incorporated by reference as Exhibit K. The ruling denied Mr. Duro's Motion to Dismiss.

18. A trial date is now set on the charge against Mr. Duro in the Salt River Pima-Maricopa Indian Community Court for November 15, 1984. Mr. Duro remains in custody at this time.

19. The tribal court's ruling on Mr. Duro's motion to dismiss can not be appealed within the judicial structure

of the Salt River Pima-Maricopa Community Court. The Code of Ordinances of the Salt River Pima-Maricopa Indian Community affords a right to appeal only to a criminal "defendant found guilty in a criminal action." See Section 4-32 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit L.

20. The appellate division of the Salt River Pima-Maricopa Indian Community Court has no regular, judicial members. Appellate judges are appointed on each occasion that an appeal is taken from a decision of the Salt River Community Court. See Section 4-31 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit M. The appellate judges are appointed by the Chief Judge, the Honorable Relman R. Manuel, Sr.

21. As a nonmember of the Salt River Pima-Maricopa Indian Community, Albert Duro is not entitled to vote in tribal elections or hold elected office. See Sections 3-1 and 3-2 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which are attached to this petition and incorporated by reference as Exhibit N.

22. As a nonmember of the Salt River Pima-Maricopa Indian Community, Albert Duro is not, nor are any members of his ethnic class or background, eligible to sit on a jury within the Salt River Pima-Maricopa Indian Community Court. See Section 5-40 of the code of Ordinances of the Salt River Pima-Maricopa Indian Community, which is attached to this petition and incorporated by reference as Exhibit O.

23. Marriages within the Salt River Pima-Maricopa Indian Community are recognized only in accordance with state (Arizona) laws. Common-law marriages are not

recognized unless they occurred prior to December 27, 1957. See Sections 10-11 and 10-12 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community, which are attached to this petition and incorporated by reference as Exhibit P.

24. No evidence was offered or admitted before the Salt River Pima-Maricopa Indian Community Court to establish that Albert duro is a member of the Torrez-Martinez band of Mission Indians or that he is an Indian as defined by the laws of the United States.

25. Mr. Duro has not previously applied for a writ of habeas corpus or other writ in this or any other court.

26. Mr. Duro continues to suffer irreparable harm due to his illegal incarceration and will suffer irreparable injury in the event that he is tried by the Salt River Pima-Maricopa Indian Community Court in violation of the Constitution and laws of the United States.

IV. *Legal Claims.*

A. *Count I—Criminal Jurisdiction.*

27. The Salt River Pima-Maricopa Indian Community Court does not have jurisdiction over Albert Duro in the criminal case previously described, Cause Number 84-0256.

28. The detention of Albert Duro by the Salt River Department of Public Safety upon the authority of the Salt River Pima-Maricopa Community Court is illegal and violative of the Constitution and laws of the United States. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

B. *Count II—Equal Protection.*

29. The Respondents have asserted that the Salt River Pima-Maricopa Indian Community Court has jurisdiction

over Albert Duro in this matter because he is a non-member Indian on the Salt River Indian Reservation. Assuming for purposes of this claim that Albert Duro is a nonmember Indian or that he is a member of the Torrez-Martinez band of Mission Indians, it is Mr. Duro's position that the tribal court still did not have jurisdiction over him in this matter.

30. The detention and trial of Albert Duro by the Salt River Pima-Maricopa Indian Community violates his right to equal protection of the law, in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution and/or the Indian Civil Rights Act, Title 25 U.S.C. Section 1302(8).

C. *Count III—Due Process.*

31. The detention of Albert Duro by the Salt River Department of Public Safety and the failure to grant his motion to dismiss (Exhibit H) by the Salt River Pima-Maricopa Indian Community Court under the circumstances previously described violates his right to due process of law under the Fifth Amendment to the United States Constitution and/or the provisions of the Indian Civil Rights Act, Title 25 U.S.C. Section 1302(8).

V. *Relief Requested.*

As a result, Mr. Duro requests this Court to issue a writ of habeas corpus and/or writ of prohibition commanding the respondents to produce Mr. Duro before this Court, at a time and place to be specified by this Court, so that this Court may further inquire into the lawfulness of respondents' custody of Mr. Duro; to discharge Mr. Duro from respondents' custody; to restrain or prohibit the respondents from further criminal prosecution against Mr. Duro; and to grant Mr. Duro such

other and further relief to which he may be entitled in this proceeding.

Dated this 7th day of November, 1984.

/s/ Albert Duro
ALBERT DURO
Petitioner

/s/ John Trebon
JOHN TREBON
Attorney for Petitioner
Albert Duro

(Affidavit Omitted in Printing)

EXHIBIT A

[Subpart A]

CONSTITUTION

ARTICLE I. TERRITORY

The jurisdiction of the Salt River Pima-Maricopa Indian Community shall extend to all lands within the boundaries of the Salt River Pima-Maricopa Indian Community established pursuant to the Act of February 28, 1859 (11 Stat. 401), and Executive Orders, to such other lands as may in the future be added thereto and to all land which from time to time be owned by the Salt River Pima-Maricopa Indian Community.

ARTICLE II. MEMBERSHIP

Sec. 1. Acquisition of membership.

The membership of the Salt River Pima-Maricopa Indian Community shall consist of:

(a) All persons of Indian blood whose names appear, or rightfully should appear, on the official allotment roll of the Salt River Reservation shall be members of the Salt River Pima-Maricopa Indian Community.

(b) All descendants of members of the Salt River Pima-Maricopa Indian Community if they are of at least one-fourth (¼) degree Indian blood and are not members of any other Indian tribes. Descendants possessing less than one-fourth (¼) degree Indian blood may be admitted to membership by a majority vote of the community council.

(c) Such other persons as the community council may see fit to admit to membership under rules of uniform application, provided no person may be admitted to membership unless he is a United States citizen and is a direct descendant of a member of the Salt River Pima-Maricopa Indian Community or is married to a member and has at least one-fourth (¼) degree Indian blood of a recognized Indian tribe.

(d) No decree of an outside court determining membership in the Salt River Pima-Maricopa Indian Community shall be recognized by the Salt River Pima-Maricopa Indian Community for membership purposes. All questions relating to the paternity of an applicant for enrollment shall be decided by the tribal court and the decision of the court shall be final.

Sec. 2. Future membership.

The community council shall have the power to pass ordinances subject to approval by the Secretary of the Interior or his authorized representative governing future membership, and the adoption of members by the Salt River Pima-Maricopa Indian Community.

Sec. 3. Membership roll.

The community council shall provide for the establishment and maintenance of an up-to-date roll of members of the Salt River Pima-Maricopa Indian Community and shall provide a fair hearing to any claimant to membership aggrieved by the omission or deletion of his name from such roll.

Chapter 2

COMMUNITY MEMBERSHIP*

Sec. 2-1. Membership as a matter of right.

(a) *Criteria.* Any person who is a descendant of a member of the Salt River Pima-Maricopa Indian Community and has at least one-fourth degree Indian blood, who is not a member of any other Indian tribe or community, and who is a citizen of the United States, is a member of the Salt River Pima-Maricopa Indian Community and shall be enrolled as a member upon filing with the official designated by the Salt River Pima-Maricopa Indian Community Council:

(1) Evidence or affidavit of nonmembership in any other Indian community or tribe, or the relinquishment of the same;

(2) Proof of descendancy by birth certificate or otherwise;

(3) Affidavit of degree of Indian blood evidencing at least one-fourth degree of Indian blood; and

(4) Evidence of United States citizenship.

(b) *Notification.* Any person filing the documents provided for herein shall be notified within two (2) working days of the filing if the documents filed are determined by the designated official to be insufficient. Notification shall be in writing deposited in the U.S. mails by certified mail; in which case the notification time ends at the time of mailing, or by personal delivery to the person who has

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* Editor's note—The used of this code should be aware that Ord. No. SRO-82-83, adopted Nov. 17, 1982, which establishes procedures within the planning and land management department for assuring that the tribal role is properly managed, is in effect, but has not been set out at length herein. Copies of the ordinance are on file in the office of the secretary of the community.

filed. Any person receiving such notice, mailed or delivered within the allowed time, may, within seven (7) days after actual receipt, apply to the Salt River Pima-Maricopa Indian Community Council for a review of the decision. The review procedure will be that established by section 2-2(b)(2). (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.1; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-2. Admittance to membership at discretion of community council.

(a) *Eligibility.*

(1) *Descendant of member.* Any person who has less than one-fourth degree Indian blood may become a member of the Salt River Pima-Maricopa Indian Community upon the filing of a proper application and upon a determination by the Salt River Pima-Maricopa Indian Community Council that the applicant is a descendant of a member of the Salt River Pima-Maricopa Indian Community and not a member of any other recognized Indian tribe or community, is of good moral character and is a citizen of the United States.

(2) *Married to member.* Any person who is not a descendant of a member of the Salt River Pima-Maricopa Indian Community may become a member of the Salt River Pima-Maricopa Indian Community upon the filing of a proper application and upon a determination by the Salt River Pima-Maricopa Indian Community Council that the applicant is married to a member of the Salt River Pima-Maricopa Indian Community, has at least one-fourth degree Indian blood of a recognized Indian tribe, is not a member of any other recognized Indian tribe or community, is of good moral character and is a citizen of the United States.

(b) *Application Procedure.*

(1) *Granting of application.* Any applicant for membership under this section shall apply in writing to the official designated by the Salt River Pima-Maricopa Indian Community Council. The application shall include one or more affidavits which attest to the good moral character of the applicant, and such other documents as are necessary to prove the facts required under subsection (a)(1) or (2) of this section. The community council may make or cause to be made such inquiry to ascertain the facts as it deems necessary to make its decision. Within thirty (30) days after filing such application, the Salt River Pima-Maricopa Indian Community Council shall decide whether the application should be granted. The decision of the council shall be communicated in writing to the applicant by certified mail or personal service within three (3) days after the decision has been made.

(2) *Council review of denied applications.* Any applicant aggrieved by the decision of the Salt River Pima-Maricopa Indian Community Council may, within seven (7) days after service of the decision has been made, apply for a hearing before the Salt River Pima-Maricopa Indian Community Council for a review of the decision. Such a review shall take place within fourteen (14) days of the filing of the application for review. The decision made by the Salt River Pima-Maricopa Indian Community Council on review shall be made within five (5) days after the date of the review hearing. The aggrieved applicant may at the time of the hearing present witnesses to show his qualifications. The community council may allow other witnesses to testify. Notice of the decision of the community council shall be given to the applicant by certified

mail or personal service within five (5) days after the decision on review has been made.

(c) *Action Upon Grant of Application.* If the community council grants an application for membership, the applicant's name shall be placed upon the roll of members of the Salt River Pima-Maricopa Indian Community.

(d) *Review by Court.* No court shall have jurisdiction to review any decision of the community council made pursuant to this chapter, except that all questions relating to the paternity of an applicant for enrollment shall be decided by the community court and the decision of the community court shall be final. (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.2; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-3. Removal from membership rolls.

Upon a petition duly executed by a member of the Salt River Pima-Maricopa Indian Community requesting that the petitioner's name be deleted from the rolls of the Salt River Pima-Maricopa Indian Community, the Salt River Pima-Maricopa Indian Community Council shall direct the proper official or employee of the Salt River Pima-Maricopa Indian Community to delete the petitioner's name from the rolls of the Salt River Pima-Maricopa Indian Community. Upon such deletion, the petitioner shall no longer be a member of the Salt River Pima-Maricopa Indian Community. (Ord. No. SRO-36-75, 12-10-75; Code 1976, § 7.3; Ord. No. SRO-66-80, 5-31-80)

Sec. 2-4. Removal of trespassers.

All persons hunting, fishing, cutting wood, driving livestock, peddling, or doing any commercial business on a trust Indian allotment without the permission of the owner or on community land in this community, without the permission of the Salt River Pima-Maricopa Indian Community Council may be prosecuted under community law, forcibly ejected from the community by a police

officer, officer of the United States Indian Service or community officer, and/or may be turned over to the custody of the United States marshal or sheriff or other officer of the State of Arizona for prosecution under federal or state law. (Code 1976, § 7.11)

Cross reference—Hunting and fishing licenses, §§ 15-11, 15-12.

Sec. 2-5. Removal of nonmember lawbreakers.

Any person not a member of the Salt River Pima-Maricopa Indian Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community by any police officer, officer of the United States Indian Service or community police officer, and or may be turned over to the custody of the United States marshal or sheriff or other officer of the State of Arizona for prosecution under federal or state law. (Code 1976, § 7.12)

Cross reference—Extradition, Ch. 7.

EXHIBIT B

THE WHITE HOUSE, *July 31, 1911.*

It is hereby ordered that the following-described lands in Pinal County, Arizona, be, and they are hereby, reserved from settlement, entry, sale, or other disposal, and set aside as an addition to the Gila River Indian Reservation, Arizona, subject to any valid existing rights of any persons thereo:

Township 5 south, range 7 east. Gila and Salt River meridian: Section 1, lots 5, 6, 7, 8, 9, and 10, SW ¼, S. ½ of NW. ¼, and the west 160 acres of the SE. ¼ of section 1. Section 12, E. ½ of NW. ¼, NW. ¼ of NW. ¼, W. ½ of NE. ¼, NW. ¾ of SE. ¼, and lots 2, 3, 4, and 9.

Township 5 south, range 8 east, Gila and Salt River meridian: Section 6, lots 6 and 7, E. ½ of SW. ¼, S. ½ of SE. ¼. Section 7, lot 1, NE. ¼ of NW. ¼ and N. ½ of NE. ¼.

WM. H. TAFT.

THE WHITE HOUSE, *December 16, 1911.*

Under authority of the act of Congress approved June 25, 1910 (36 Stat., 847), and on the recommendation of the Secretary of the Interior, it is hereby ordered that all of township 5 south, range 7, east, Gila and Salt River meridian, Arizona, except such portions thereof as have been heretofore reserved and set aside as an addition to the Gila River Indian Reservation, be temporarily withdrawn from settlement, location, sale, or entry, except as provided in said act, and be reserved for classification.

WM. H. TAFT.

SALT RIVER RESERVATION

EXECUTIVE MANSION, *June 14, 1879.*

In lieu of an Executive order dated January 10, 1879, setting apart certain lands in the Territory of Arizona as a reservation for the Pima and Maricopa Indians, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale and settlement, and set apart for the use of said Pima and Maricopa Indians, as an addition to the reservation set apart for said Indians by act of Congress approved February 28, 1859 (11 Stat., 401), the several tracts of country in said Territory of Arizona lying within the following boundaries, viz:

Beginning at the point where the range line between ranges 4 and 5 east crosses the Salt River; thence up and along the middle of said river to a point where the easterly line of Camp McDowell Military Reservation, if prolonged south, would strike said river; thence northerly to the southeast corner of Camp McDowell Reservation; thence west along the southern boundary line of said Camp McDowell Reservation to the southwest corner thereof; thence up and along the west boundary line of said reservation until it intersects the north boundary of the southern tier of sections in township 3 north, range 6 east; thence west along the north boundary of the southern tier of sections in townships 3 north, ranges 5 and 6 east, to the northwest corner of section 31, township 3 north, range 5 east; thence south along the range line between ranges 4 and 5 east to the place of beginning.

Also all the land in said Territory bounded and described as follows, viz:

Beginning at the northwest corner of the old Gila Reservation; thence by a direct line running northwesterly until it strikes Salt River 4 miles east from the intersection of said river with the Gila River; thence down and along the middle of said Salt River to the mouth of

the Gila River; thence up and along the middle of said Gila River to its intersection with the northwesterly boundary line of the old Gila Reservation; thence northwesterly along said last-described boundary line to the place of beginning.

It is hereby ordered that so much of townships 1 and 2 north, ranges 5 and 6 east, lying south of the Salt River, as are now occupied and improved by said Indians, be temporarily withdrawn from sale and settlement until such time as they may severally dispose of and receive payment for the improvements made by them on said lands.

R. B. HAYES.

THE WHITE HOUSE, *October 20, 1910.*

It is hereby ordered that the following described land in the State of Arizona, viz. all of sections 1 and 12 in township 1 north, range 4 east of the Gila and Salt River meridian, be, and the same are hereby, withdrawn from settlement, entry, and sale, and set apart as an addition to the Salt River Indian Reservation: *Provided*, That nothing herein shall affect any existing valid rights of any person to the lands described.

WM. H. TAFT.

THE WHITE HOUSE, *March 22, 1911.*

It is hereby ordered that Executive order of June 14, 1879, creating a reservation for use of the "Pima and Maricopa Indians," be, and the same is hereby, amended so as to make said reservation available for use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

WM. H. TAFT.

THE WHITE HOUSE, *September 28, 1911.*

Executive order of June 14, 1979, temporarily withdrawing from sale and settlement for Indian uses so much of townships 1 and 2 north, ranges 5 and 6 east, in Arizona, lying south of the Salt River, is hereby amended so as to permanently withdraw from settlement, entry, sale, or other disposition all those tracts lying south of the Salt River in sections 25, 26, 34, and 36, except the SE¼ of the SE¼ of section 34, in township 2 north, range 5 east, of the Gila and Salt River meridian, for the use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon, subject to any existing valid rights of any persons thereto.

WM. H. TAFT.

THE WHITE HOUSE, *October 23, 1911.*

Executive order of June 14, 1879, temporarily withdrawing from sale and settlement for Indian uses all of townships 1 and 2 north, ranges 5 and 6 east, in Arizona, lying south of the Salt River, is hereby amended so as to withdraw permanently from settlement, entry, sale, or other disposition all that part of section 35 in township 2 north, range 5 of the Gila and Salt River meridian, lying south of the Salt River, for use of the Pima and Maricopa Indians, and such other Indians as the Secretary of the Interior may see fit to settle thereon, subject to any existing valid rights of any persons thereto.

WM. H. TAFT.

EXHIBIT C

CRIMINAL COMPLAINT
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Magistrate's Case No. 84-5125M

UNITED STATES OF AMERICA

v.

ALBERT ROBERT DURO, and WENDEL LACKEY

Complaint for violation of Title 18,
United States Code § 1153 and 1111 and 2

Morton Sitver. U.S. Magistrate, Phoenix, AZ

Date of Offense

6/15/85

Place of Offense

Victory Acres #1
Salt River Indian Res

Address of Accused (if known)

Duro—Unknown
Lackey—Unknown

Complainant's Statement of Facts Constituting the Offense or Violation:

On or about the 15th day of June, 1984, in the District of Arizona, within the confines of the Salt River Indian Reservation, Indian Country, ALBERT ROBERT DURO and WENDEL LACKEY, Indians, did murder, and aid and abet the murder of, PHILLIP FERNANDO BROWN, an Indian, in violation of Title 18 United States Code, Sections 1153, 1111, and 2.

Basis of Complainants Charge Against the Accused:

SEE ATTACHED

Complaint Authorized by AUSA John D. Lyons, Jr.
Recommended Bond: $50,000

Material Witnesses in Relation to this Charge:

Sisto Ramirez, Carl Standing Elk, S/A L. Bruce Atkins, S/A Mark S. Bullock

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.

/s/ L. Bruce Atkins
Complainant
S/A FBI

Sworn to before me and subscribed in my presence,

/s/ Morton Sitver
Complainant
Magistrate

6/18/84

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No.: CR 84-235 PHX

VIO: 18 U.S.C. §§ 1153, 1111 and
2 (CIR-Murder-1st Degree)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALBERT ROBERT DURO and WENDEL LACKEY,
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

On or about the 15th day of June, 1984, in the District of Arizona, and within the confines of the Pima-Salt River Indian Community, Indian Country, ALBERT ROBERT DURO and WENDEL LACKEY, Indians, with premeditation and malice aforethought and by means of a firearm did murder and aid and abet the murder of Phillip Fernando Brown, an Indian.

In violation of Title 18, United States Code, Section 1153, 1111 and 2.

A TRUE BILL

/s/ Davis L. Green
Foreman of the Grand Jury
July 25, 1984

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR-84-235-PHX-WPC

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALBERT ROBERT DURO and WENDEL LACKEY,
Defendants.

DISMISSAL OF INDICTMENT

The United States of America, pursuant to Rule 48, *F.R.Cr.P.*, with leave of the court being granted, dismisses the Indictment without prejudice against Albert Duro and Wendel Lackey.

Respectfully submitted this 17th day of September, 1984.

A. MELVIN MCDONALD
United States Attorney
District of Arizona

/s/ Roger W. Dokken
ROGER W. DOKKEN
Assistant U.S. Attorney

Copy of the foregoing hand-delivered this 17th day of September, 1984, to:

John Trebon
Assistant Federal Public Defender
United States Courthouse, Room 5000
230 North First Avenue
Phoenix, Arizona 85025
Attorney for defendant Duro

/s/ Roger W. Dokken
ROGER W. DOKKEN
Assistant U.S. Attorney

ORDER

Leave of the court is granted for the United States to dismiss the Indictment without prejudice in the above-captioned case.

DATED this 17 day of September, 1984.

/s/ [Illegible]
United States District Judge

EXHIBIT F

[LOGO]

SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY COURT
SCOTTSDALE, ARIZONA

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

vs

ALBERT DURO,

Defendant

CRIMINAL COMPLAINT

The above defendant is charged by this complaint with the offense of Discharge of Firearms, which is in violation of Section 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Community to wit: The said defendant did on or about the 18th day of June, 1984, at about 10:30 P.M., and before the signing of this complaint, within the boundaries of the Salt River Indian Reservation: Albert Duro discharged at least (2) shots from a lever action rifle in the Victory Acres I residential zone. One of the shots struck and wounded a 14 year old boy who was riding his bicycle nearby. This boy subsequently died as a result of the wound.

Against the peace and dignity of the Salt River Pima-Maricopa Indian Community.

Witnesses: /s/ [Illegible]

Authority: Ch. I, Section 1

Date 6-18-84

EXHIBIT G

GILA RIVER INDIAN COMMUNITY
SACATON, AZ. 85247

[LOGO]

Tribal Enrollment
Administrative Offices
P.O. Box 87—(602) 562-3311

CERTIFICATION OF INDIAN BLOOD
(REGULAR IDENTIFICATION)

Dear Mr. Andrews:

I HEREBY CERTIFY THAT: Phillip Fernando Brown DATE OF BIRTH: February 1, 1970 IS AN ENROLLED MEMBER OF THE GILA RIVER PIMA/MARICOPA TRIBE, WITH GRID. #: 13,917 AND IS: 15/16 DEGREE OF: Pima-Maricopa-Klamath INDIAN BLOOD.

June 21, 1984
DATE:

/s/ Marti Manuel
SIGNATURE

Enrollment Coordinator
TITLE:

EXHIBIT H

IN THE TRIBAL COURT OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff,

-vs-

ALBERT DURO,
Defendant.

MOTION TO DISMISS

ALBERT DURO, by and through his attorney, requests that this Court enter an order dismissing all pending criminal charges against him. The request is based upon the fact that this Court does not have criminal jurisdiction over the person of Albert Duro, who is not a member of the Salt River Pima-Maricopa Indian Community.

MEMORANDUM

I. *Introduction.*

A complaint against Albert Duro dated June 18, 1984, charges him with illegal discharge of a firearm in violation of § 6-131 of the Code of Ordinances of the Salt River Pima-Maricopa Indian Community (hereinafter referred to as the Salt River Community). The illegal discharge allegedly occurred within the reservation boundaries of the Salt River Communty on June 15, 1984.

It is also well known that the local charges against Mr. Duro began to proceed in tribal court only after federal.

homicide charges against him were dismissed.[1] Upon information and belief, Mr. Duro was held in the Maricopa County Jail upon request of the U.S. Marshal's Office after federal charges were dismissed so that he could be turned over to the Salt River Community.

According to reports disclosed by the prosecution, many of the participants in the incidents of June 15, 1984, are tribal members of either the Salt River Community or the Gila River Indian Community. No such claim is made with respect to Albert Duro. In fact, he is not either a member or eligible for membership in the Salt River Community. See Article II, Section I of the Constitution of the Salt River Community; and Section 2 (pages 181-182) of the Salt River Community Code.

Criminal jurisdiction of the Salt River Community is formally asserted over "any person otherwise subject to the jurisdiction of the Salt River Court." Section 4-1(c) (pages 301-302) of the Salt River Code. Albert Duro respectfully submits that, as a non-tribal member, this Court does not have personal jurisdiction over him for purposes of the pending criminal charge. He requests dismissal of all charges and immediate release.

II. *Criminal Jurisdiction of the Salt River Community.*

The landmark decision of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), was one of the first to hold that tribal courts could not validly exercise criminal jurisdiction over non-tribal members, in spite of the fact that criminal misconduct allegedly occurred within the recognized boundaries of the Indian tribe. The issue in *Oliphant* was clearly drawn. The Saquamish tribal government adopted a Law and Order Code in 1973 which expressly exerted

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[1] Federal prosecution in Arizona extended from July 2, 1984, to September 17, 1984. Mr. Duro was arrested in California prior to July 2, 1984.

criminal jurisdiction over both Indians and non-Indians. *Id.* at 193. Tribal authorities had arrested and charged Mark Oliphant for assaulting a tribal officer and resisting arrest on the reservation. Moreover, Oliphant was a resident of the Post Madison Reservation at the time of his arrest. *Id.* at 194. Nevertheless, the Supreme Court declared that the Suquamish tribal court could not exercise criminal jurisdiction over Mr. Oliphant.

Since the defendant was a white person, the Supreme Court merely decided in *Oliphant* that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, unless authorized by Congress to do so. The Court reasoned that Indian tribes, as a diminished "quasi-sovereign", continue to retain only those powers not "inconsistent with their status". *Id.* at 208. The power to determine the liberty of its citizens ultimately rests with the United States. *Id.* at 210. Quoting from an earlier decision, the Court recognized that the "limitation" upon the sovereignty of Indian tribes "amounts *to the right of governing every person within their limits except themselves.*" 435 U.S. 191, at 209 (original emphasis). In other words, after incorporation into the United States, Indian tribes retained only the right of internal self-government, including criminal jurisdiction over its own members. *Oliphant v. Suquamish Indian Tribe, supra.*

The teachings of *Oliphant* have been reaffirmed by later decision of the Supreme Court, which explicitly refer to the power of tribal governments (relating to criminal jurisdiction) in terms of "tribal membership".[2]

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[2] Tribal governments continue to retain civil jurisdiction and the power to tax as attributes of a "quasi-sovereign" as well. For instance, Indian tribes may tax cigarette purchases that occur within the bundaries of the reservation to non-tribal members. *Washington v. Confederated Tribes of the Coville Indian Reservation*, 447 U.S. 133, 152-154 (1980). On the other hand, state governments may tax similar purchases to nonmembers even though

> It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members.* Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions (cites omitted; emphasis added).
>
> *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

Thus, although the *Wheeler* court held that both the Navajo tribe and the United States, as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo reservation, the tribe could do so only because Wheeler was a tribal member. The meaning of *Oliphant* was accordingly clarified.

> Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestitute of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat,

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sales took place on the reservation. *Id.* at 154-157. In the same vein, tribes retain power to impose its building, health and safety regulations on non-tribal members who own business on the reservation, *Cardin v. De La Cruz*, (9th Cir. 1982), and may prohibit or regulate hunting or fishing by nonmembers on tribal land. *Montana v. United States*, 450 U.S. 544 (1981). It is important to distinguish the retention of civil jurisdiction as opposed to criminal jurisdiction. Only the latter is involved in this case.

543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559; *Cherokee Nation v. Georgia*, 5 Pet. at 17-18; *Fletcher v. Peek*, 6 Cranch 87, 147 (Johnson, J. concurring), and, as we have recently held, *they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978).

It is important to note that the decision of the Supreme Court in *Wheeler* was unanimous. The limit of tribal, criminal jurisdiction under *Wheeler* to members of the tribe has been repeatedly emphasized. See *Washington v. Confederated Tribes of the Coville Indian Reservation*, 447 U.S. 134, 152 (1979). The powers of Indian self-government, "including the power to prescribe and enforce internal criminal laws . . ." extend "only [to] relations among *members of a tribe*." (Emphasis added). *Montana v. United States*, 450 U.S. 544, 564 (1980). It follows that Albert Duro, as a non-tribal member, can not be prosecuted by the Salt River Community. The charges against him must be dismissed for lack of jurisdiction over his person.[3]

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[3] It is also easy to recognize that Albert Duro and his particular ethnic group is expressly excluded from participation in political, governmental, or judicial affairs of the Salt River Community.

As noted previously, Mr. Duro is not eligible for tribal membership. He cannot vote in elections of the Salt River Community or hold office. Art. II, Section 1 of the Constitution of the Salt River Community; Section 3-1 and 3-2 (pages 235-37) of the Salt River Community Code. He nor any member os his class is eligible to sit on a jury within the Salt River Community. Section 5-40 (pages 379-80) of the Salt River Community Code. In sum, it would be unfair to exert criminal jurisdiction over Albert Duro, while, at the same time, the Salt River Community has expressly excluded him and his own people from participation in all tribal affairs.

Respectfully submitted: October 2, 1984.

FREDRIC F. KAY
Federal Public Defender

/s/ John Trebon
JOHN TREBON
Asst. Federal Public Defender

[Filed October 4, 1984]

(Certificate Omitted in Printing)

EXHIBIT I

IN THE TRIBAL COURT OF THE
SALT RIVER PIMA-MARICOPA INDIAN TRIBES
MARICOPA COUNTY, STATE OF ARIZONA

CR-84-0256

SALT RIVER INDIAN COMMUNITY
Plaintiff

vs.

ALBERT DURO
Defendant

ANSWER TO MOTION TO DISMISS

COMES NOW Faithe C. Seota, Prosecutor for the Salt River Pima-Maricopa Indian Community and motions the honorable court to deny the motion to dismiss based on the following:

I

That this is a court of competent jurisdiction by virtue of section 4-1 of the Salt River Pima-Maricopa Indian Community Law and Order Code entitled Jurisdiction, subsection (c) entitled *Criminal Jurisdiction over persons*, subsection (1) and (2) address themselves to the extent over which the Salt River Pima-Maricopa Indian Community has and does exercise its jurisdiction. Subsection (2) particularly addresses itself to this issue:

> "Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the Community Court."

QUESTION: WHAT DOES "any person otherwise subject to the jurisdiction of the Salt River Court" mean?

For all intents and purposes basing the answer to that question on the Supreme Court decision of *Oliphant v. The Suquamish Indian Tribe* 435 U.S. 191 (1978). The Supreme Court held that Indian Tribes do not have criminal jurisdiction over non-Indians.

> "By submitting to the overriding sovereignty of the United States Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Oliphant v. The Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)

QUESTION: Is Albert Duro an non-Indian?

First what is an Indian? Indian ". . . for legal purposes in a definition of Indian as a purpose meeting two qualifications: (a) that some of the individuals ancestors lived in what is now the United States before it's discovery by Europeans, and (b) that the individual is recognized as a Indian by his for her tribe or community." (Cohen Felix, *Handbook of Federal Indian Law* (1982, p 20). The Torres-Martinez Band of Mission Indian (Cahuilla) is a federally recognized tribe of which Dr. Duro is a member since the band is federally recognized it would be safe to assume that Mr. Duro meets the preceeding qualifications of an Indian. By process of elimination the Court in Salt River does not exercise criminal jurisdiction over non-Indians. Since Mr. Duro is not a non-Indian this court has lawful jurisdiction over his person. Counsel Trebon alludes to the idea that this court also lacks jurisdiction over Mr. Duro because the federal court dismissed charges against the defendant.

> "Major Crimes Act 18 U.S.C. Section 1153 places exclusive jurisdiction in this case involving unenumerated Indian against Indian offenses in Tribal Court. The government argues that jurisdiction lies

concurrently in tribal and federal courts." *United States v. Blue* No. 82-1995 (8th Cir., Dec. 1, 1983.). *United States v. Wheeler* 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. ed 303 says:

> "The conclusion that an Indian tribe's power to punish tribal offenders is part of it's own retained sovereignty is clearly reflected in a case decided by this court more than 80 years ago, *Talton v. Mayes*, 163 U.S. 376."

It is important to note that none of the Supreme Court cases cited by the defendant deal with the question of whether a tribe may prosecute a member of another federally recognized Indian tribe for violation of it's criminal ordinances. There arises the question of whether the aspect of sovereignty, the right to try a member of another federally recognized Indian tribe for violation of a tribe's criminal ordinances has been "withdrawn . . . by implication as a necessary result of . . . their independent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) No reason has been given by the defendant that would compel the conclusion that such a withdrawal of such sovereignty has occurred. Mr. Duro's relationship with this community and it's members and work places is such that Albert Duro had and has within his grasp the possibility of being included as a member of the Salt River Pima-Maricopa Indian Community. He was not of a "particular ethnic group . . . expressly excluded . . ." (page 6 note 3 of Motion to Dismiss). As a member of a federally recognized tribe living in a "common law" relationship with a member of the Salt River Pima-Maricopa Indian Community, he was two steps from membership—marriage and application and approval by the Community Counsel. Article II, Section 1 (c), *Constitution and By-Laws of the Salt River Pima-Maricopa Indian Community.*

WHEREFORE the Prosecution respectfully requests that this Court deny the defendant's Motion to Dismiss.

SUBMITTED this 12th day of October, 1984

/s/ Faithe C. Seota
FAITHE C. SEOTA
Prosecutor

(Certificate Omitted in Printing)

EXHIBIT J

Chapter 4

COURTS GENERALLY *

ARTICLE I. IN GENERAL

Sec. 4-1.—Jurisdiction.

(a) *Court of original and appellate jurisdiction.* The Salt River Pima-Maricopa Indian Community Court is the court of original and appellate jurisdiction within the Salt River Pima-Maricopa Indian Community.

(b) *Subject matter jurisdiction limited by council action.* The Salt River Court shall have jurisdiction in all cases involving disputes in contract or tort and shall determine such cases upon the customary law of the Salt River Pima-Maricopa Indian Community as may be augmented by the common law as understood in the State of Arizona to the extent that the court requires, in order to do substantial justice to the parties in the dispute. In all other respects the jurisdiction of the Salt River Pima-Maricopa Indian Community Court is limited to the subject matter of those causes, disputes and prosecutions which the Salt River Pima-Maricopa Indian Community Council by enactment accords to the court.

(c) *Criminal jurisdiction over persons.*

(1) The court of the Salt River Pima-Maricopa Indian Community shall have jurisdiction over all offenses

* Cross references—Probate, Ch. 9; domestic relations, Ch. 10; juvenile code, Ch. 11.

enumerated in the Code of Ordinances when committed by any person otherwise subject to the jurisdiction of the Salt River Court.

(2) Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the community court.

(3) The Salt River Pima-Maricopa Indian Community shall be taken to include all territory within the reservation boundaries, including fee-patented lands, rights-of-way, roads, water, bridges and land used for schools, churches or agency purposes.

* * * *

EXHIBIT K

Salt River

PIMA-MARICOPA INDIAN COMMUNITY COURT
SCOTTSDALE, ARIZONA

No. CR-84-0256

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

-vs-

ALBERT DURO

Defendant

RULING ON MOTION TO DISMISS

This matter having come before the above-entitled Court on this 15th day of October, 1984 on a Motion to Dismiss, with the prosecutor, FAITHE SEOTA and defendant, ALBERT DURO with counsel, JOHN TREBON being present and ready to proceed.

The complainant alleges that ALBERT DURO, defendant committed the offense of Discharge of Firearms which is in violation of section 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Indian Community, in that the said defendant did on or about the 15th day of June, 1984, at about 10:30 P.M., within the boundaries of the Salt River Indian Reservation to wit:

> ALBERT DURO discharged at least (2) shots from a lever action rifle in the Victory Acres I residential zone. One of the shots struck and wounded a 14 year old boy who was riding his bicycle nearby. This boy subsequently died as a result of the wound.

The motion to dismiss argues that this Court has no jurisdiction over the person of the defendant, ALBERT DURO. The basis of this argument is that the defendant is a non-member of this community, the defendants counsel states that:

> "Criminal jurisdiction of the Salt River Community is formally asserted over "any person otherwise subject to the jurisdiction of the Salt River Court." Section 4-1(c) (pages 301-302) of the Salt River Code. Albert Duro respectfully submits that, as a non-tribal member, this Court does not have personal jurisdiction over him for purposes of the pending criminal charge. He requests dismissal of all charges and immediate release."

The prosecution argues and motions for the Court to deny the motion to dismiss on the following basis:

> "That this is a court of competent jurisdiction by virtue of section 4-1 of the Salt River Pima-Maricopa Indian Community Law and Order Code entitled Jurisdiction, subsection (c) entitled Criminal Jurisdiction over Persons. Subsection (1) and (2) address themselves to the extent over which the Salt River Pima-Maricopa Indian Community has and does exercise it's jurisdiction. Subsection (2) particularly addresses itself to this issue:
>
> > "Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the Community Court."

The defendant sets forth the cases of OLIPHANT v. SUQUAMISH INDIAN TRIBE, 435 U.S. 191 (1978) and UNITED STATES v. WHEELER, 435 U.S. 313, 322 (1978), as the basis for his assertion that this Court does not have jurisdiction over him. The defendant's counsel sets the following argument:

"In Oliphant, the defendant was a white person, the Supreme Court merely decided that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, unless authorized by Congress to do so. The Court reasoned that Indian tribes, as a diminished "quasi-sovereign", continue to retain only those powers not "inconsistent with their status." *Id.* at 208. The power to determine the liberty of its' citizens ultimately rests with the United States. *Id.* at 210. Quoting from an earlier decision, the Court recognized that the "limitation" upon the sovereignty of Indian tribes "amounts *to the right of governing every person within their limits except themselves.*" 435 U.S. 191, at 209 (original emphasis). In other words, after incorporation into the United States, Indian tribes retained only the right of internal self-government, including criminal jurisdiction over its own members. *Oliphant v. Suquamish Indian Tribe, supra.*

The teachings of *Oliphant* have been reaffirmed by later decisions of the Supreme Court, which explicitely refer to the power of tribal governments (relating to criminal jurisdiction) in terms of "tribal membership".

It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members.* Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions (cites omitted; emphasis added).

United States v. Wheeler, 435 U.S. 313, 322 (1978).

Thus, although the *Wheeler* court held that both the Navajo tribe and the United Sates (sic), as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo reservation, the tribe could do so only because Wheeler was a tribal member. The meaning of *Oliphant* was accordingly clarified.

> Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestitute of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat, 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pct. 515, 559; *Cherokee Nation v. Georgia*, 5 Pct. at 17-18; *Fletcher v. Peek*, 6 Cranch 87, 147 (Johnson J. concurring), and, as we have recently held, *they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).
>
> *United States v. Wheeler*, 435 U.S. 313, 326 (1978)

In opposition to the defendants position the prosecution argues the following:

> "It is important to note that none of the Supreme Court cases cited by the defendant deal with the question of whether a tribe may prosecute a member of another federally recognized Indian tribe for violation of it's criminal ordinances. There arises the question of whether the aspect of sovereignty, the right to try a member of another federally recognized Indian tribe for violation of a tribe's criminal ordinances has been "withdrawn . . by implication as

a necessary result of . . . their independent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) No reason has been given by the defendant that would compel the conclusion that such a withdrawal of such sovereignty has occurred."

With the Court having considered, the motion to dismiss, the answer to the motion and having reviewed the two primary cases cited, that of OLIPHANT and WHEELER, the Court now enters its opinion and ruling.

OPINION

Upon review of the OLIPHANT case, we find that the primary question before the Court at that time was whether Indian tribes had inherent criminal jurisdiction over non-Indians. The United States Supreme Court held and ruled that Indian tribes historically and traditionally did not have jurisdiction over non-Indians, absent any specific authority by Congress. The consistent language in this ruling has been in support of the rights of Indian tribes to control internal affairs. We quote from OLIPHANT:

> "In Ex parte Kenyon, 14 Fed. cases 353 (WD ARK. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legel relationships between Indians and non-Indians, held that to give an Indian tribal "court jurisdiction of the person of an offender, such offender must be an Indian." Id., at 355. The conclusion of Judge Parker was reaffirmed only recently in a 1970 Opinion of the Solicitor of the Department of the Interior. See 77 I.D. 113 (1970.

The Supreme Court viewed the history of criminal jurisdiction in Indian country as one of an attempt to protect the Indians from non-Indians and that this attempt to protect the Indians manifested itself in con-

gressional statutes establishing jurisdiction over non-Indians. Along with this attempt to protect the Indians, was also the object to allow "Indian nations criminal jurisdiction over Indians." Again we quote from OLIPHANT:

> "In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In In re Mayfield, 141 U.S. 107, 115-116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the White population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." Ibid. While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

We now look at WHEELER, in which the defendant states supports his position as well as supporting or reaffirming OLIPHANT v. SUQUAMISH INDIAN TRIBE.

> "Moreover, the sovereign power of a tribe to prosecute *its members* for tribal offenses clearly does not fall within that part of sovereignty which the In-

dians implicitly lost by virtue of their dependent status. The areas in which such implicit divestitute of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559; *Cherokee Nation v. Georgia*, 5 Pet. at 17-18; *Fletcher v. Peek*, 6 Cranch 87, 147 (Johnson, J. concurring). and, as we have recently held, *they cannot try non-members in tribal courts. Oliphant v. Suquamish Indian Tribe*, ante, p. 191. (Emphasis added).

United States v. Wheeler, 435 U.S. 313, 326 (1978)

This particular section from the WHEELER case implies the loss of jurisdiction over non-members. But upon examination of the language, the divesture of sovereignty exists only in external tribal matters and no loss of sovereignty exists over internal affairs, in both criminal and civil cases. With the High Court using the term "non-members" in reaffirming their holding in OLIPHANT v. SUQUAMISH INDIAN TRIBE, it can only be interpreted, that they use non-member and non-Indian as having the same meaning. This is the only interpretation possible in that the only question before the Court in OLIPHANT was whether the tribal court had jurisdiction over a non-Indian, the Court held, that the tribal court had no jurisdiction.

With this review of the two cases offered to support the defendants motion to dismiss, we find that they do not apply to the instant case, in OLIPHANT, the question was one of jurisdiction over non-Indians and in WHEELER the question of double jeopardy arose, when

the federal government, prosecuted after an Indian defendant was convicted in tribal court. While the Supreme Court in these two cases cited, addressed, the issue of member verses non-member it was never the primary issue, therefore there was no ruling on this question. The High Court has expressed implicitly that we have no jurisdiction over non-Indians, it has also stated that the Indian nations control their own internal affairs. Therefore we now have an issue before this Court, where we address this question of whether we have jurisdiction over a non-member. With all due consideration to the primary issues and the arguments we now enter the following ruling:

> The question before the Court at this time is whether this Court has jurisdiction over the person of ALBERT DURO. Upon examination of the arguments presented, we have determined that MR. DURO does not fall within the category of being non-Indian and that as per Section 4-1(c) Criminal Jurisdiction over persons subsection (2) the defendan' shall be deemed to have consented to the jurisdiction of the Community Court. Therefore, the motion to dismiss by the defendant is hereby denied and sets this case for trial.

IT IS SO ORDERED!

DONE this 19th day of October, 1984.

/s/ Relman R. Manuel Sr.
RELMAN R. MANUEL SR.
Chief Judge
Salt River Pima-Maricopa
Indian Community Court

[SEAL]

EXHIBIT L

ARTICLE III. APPEALS

Sec. 4-31. Appellate division.

The appellate division of the Salt River Pima-Maricopa Indian Community Court shall consist of two (2) judges of the Salt River Pima-Maricopa Indian Community Court appointed by the chief judge of the Salt River Pima-Maricopa Indian Court on each occasion that an appeal is taken from a decision of the Salt River Community Court. No judge shall sit on a court of appeals in a case in which the original proceedings were tried by that judge or if that judge was disqualified under section 4-26 of this Code. If otherwise qualified, the chief judge may be appointed to serve. (Amd. to Ord. No. SRO-33-75, § 1.9(a), 5-5-80)

Sec. 4-32. Right to appeal.

Any party aggrieved by the verdict or judgment in a civil action and any defendant found guilty in a criminal action may appeal from such verdict or judgment to the appellate division of the Salt River Community Court in accordance with the procedure provided in this Code. (Amd. to Ord. No. SRO-33-75, § 1.9(b), 5-5-80)

Sec. 4-33. Grounds for appeal.

The appellate division shall determine the appeal upon the findings of fact, conclusions of law and judgment entered in the case by the judge of the community court who presided at the trial or other final proceeding in the case.

(a) *Findings of fact.* The findings of fact shall be presumed to be without reversible error. The presumption may be overcome by a sworn written statement presented to the court at the time of

the filing of the notice of appeal which establishes on the basis of the statement, any one or more of the following grounds:

(1) That a witness ready and willing to testify at the time of the trial on behalf of the appellant was not allowed by the trial judge to take the witness stand and testify, and such testimony would have materially altered the judgment of the trial court.

(2) That the trial judge refused to admit documentary or other physical evidence, and such evidence would have materially altered the judgment of the trial court.

(3) That after the trial, the appellant discovered material evidence which, with reasonable diligence, could not have been discovered and produced at trial, and such evidence would have materially altered the judgment of the trial court.

In the event the appellate division finds the presumption is overcome pursuant to this subsection, the appellate division shall remand the case back to the trial court for the limited purpose of hearing only the excluded or new evidence and any evidence in rebuttal presented by the appellate to such evidence. At the conclusion of such remand hearing, the trial court shall, within ten (10) days of the hearings, make and enter such amended findings of fact, conclusions of law and judgment as the trial court deems necessary, or in the event the trial court determines that the evidence adduced at the remand hearing requires no amendment, the trial court will issue its order reaffirming its prior findings of fact, conclusions of law and judgment. The findings of fact, conclusions of law and judgment or order will be

transmitted to the appellate division and such findings of fact, conclusions of law and judgment or order will not be subject to a separate appeal.

(b) *Conclusions of law.* The appellate division shall determine whether the conclusions of law are correct based on the findings of fact or amended findings of fact and whether the judgment is supported by the facts and the law. Any party to the case may request an opportunity to appear before the court prior to its decision to give the court such party's view of the case. The other party or parties shall be given adequate notice of the hearing and an opportunity to present such party's or parties' view of the case. Such views shall be presented orally by the parties and shall only deal with the ground relied on by the appellant as set out in the notice of appeal. The hearing shall be limited to one hour and the time will be equally divided between the parties. If the appellate division finds that the conclusions of law are incorrect and that the judgment is incorrect, or that the conclusions of law are correct and the judgment is incorrect, it shall issue a new judgment correctly stating the conclusions of law and judgment. Such judgment shall be a final judgment not subject to rehearing, review or appeal. The appellant shall prevail only if both judges of the appellate division agree that the appellant's position is correct. (Amd. to Ord. No. SRO-33-75, § 1.9(c), 5-5-80)

Sec. 4-34. Appeals procedure.

Appeals shall be taken from any judgment of the trial court in the following manner:

(a) *Notice of appeal.* Written notice of appeal shall be given within five (5) days after the day written and executed judgment is entered with the

clerk or in the case of a criminal case, five (5) days after a written judgment and sentence is entered with the clerk. The notice of appeal shall state all the grounds for appeal relied on by the appellant. The notice of appeal shall not be amended once it is filed. The appellee may file a short written response to the grounds for appeal within ten (10) days after the notice of appeal is filed. The notice of appeal and response shall be mailed to the opposing party on the day it is filed.

(b) *Court costs.* There shall be posted with the clerk of the court a cash fee of twenty-five dollars ($25.00) to cover costs and disbursements.

(c) *Criminal bond.* In a criminal case, the judge may require that a bond be posted not exceeding twice the amount of the fine imposed, or in the discretion of the judge, a cash bond of no more than twenty-five dollars ($25.00) may be furnished in lieu thereof.

(d) *Civil bond.* In a civil case, there shall be posted with the clerk of the court a bond equal to twice the amount of the judgment, including costs, when the judgment is for money, or twice the value of the property including costs, when the judgment is for the return of property. A cash deposit for the amount of the judgment or the value of the property, plus costs, may be made in lieu of a bond.

(e) *Witness expenses.* The expenses of all witnesses subpoenaed by the appellant shall be paid by him and is not intended to be included in the twenty-five dollar ($25.00) filing fee provided for in the foregoing. If the appellant is indigent, the fee or bond may be waived by the court. (Amd. to Ord. No. SRO-33-75, § 1.10, 5-5-80)

Secs. 4-45–4-40. Reserved.

EXHIBIT M

ARTICLE III. APPEALS

Sec. 4-31. Appellate division.

The appellate division of the Salt River Pima-Maricopa Indian Community Court shall consist of two (2) judges of the Salt River Pima-Maricopa Indian Community Court appointed by the chief judge of the Salt River Pima-Maricopa Indian Court on each occasion that an appeal is taken from a decision of the Salt River Community Court. No judge shall sit on a court of appeals on a case in which the original proceedings were tried by that judge or that judge was disqualified under section 4-26 of this Code. If otherwise qualified, the chief judge may be appointed to serve. (Amd. to Ord. No. SRO-33-75, § 1.9(a), 5-5-80)

Sec. 4-32. Right to appeal.

Any party aggrieved by the verdict or judgment in a civil action and any defendant found guilty in a criminal action may appeal from such verdict or judgment to the appellate division of the Salt River Community Court in accordance with the procedure provided in this Code. (Amd. to Ord. No. SRO-33-75, § 1.9(b), 5-5-80)

EXHIBIT N

Chapter 3

VOTING AND ELECTIONS

Sec. 3-1. Voters.

(a) *Registration.* The secretary of the community shall be the registrar of voters and shall be responsible for the registration of voters for any election. The places of registration shall be determined by the registrar subject to the provisions of this chapter. Any eligible members of the community may register to vote for any election at any place of registration up to twenty (20) days prior to such election, except that in the case of any special election for chief judge, any eligible member of the community may register to vote at any place of registration up to ten (10) days prior to such special election. The office of the secretary of the community shall be, during normal business hours, a place of registration during working days. Registration in that office which occurs subsequent to a date twenty (20) days prior to an election shall not be effective as to that election. The registrar shall within sixty-five (65) days before election day establish at least one additional place of registration in the Salt River District and one place of registration in the Lehi District. Such places of registration shall be open during the hours from 10:00 a.m. until 2:00 p.m. on the four (4) Saturdays prior to the twentieth day before election day. The registrar shall appoint such deputy registrars as necessary to assist the registrar in the exercise of his office.

(b) *Eligibility.* All members of the Salt River Pima-Maricopa Indian Community, as a membership is defined in Article II of the constitution and bylaws, who will have reached their eighteenth birthday by the day set for election, are eligible to vote in community elec-

tions. However, no person shall be permitted to vote unless his name appears on the list of registered voters of the district in which he proposed to vote. The name of each person who fails to vote at a community election after such person has registered to vote shall be removed from the list of registered voters. Any such person may again register to vote in subsequent elections.

(c) *Lists of registered voters.* A list of the registered voters in each district shall be prepared by the registrar or persons designated by her. The registered list for each district shall be presented to the judge of the election board of that district and a copy of the list shall be given to each member of the election board of that district and a copy shall be posted at each public place of posted notices at least fifteen (15) days prior to an election. Each election board shall review its registered list carefully, disqualify persons who have not registered for the election, or remove the names of persons known to be dead and of persons known not to belong to that district, correcting the names of women who have married or of persons whose names have been misspelled, or who are registered to vote are known to belong to the district but whose names have been omitted from the district list in error. The corrected registered list shall be posted at the polling place of the district at least five (5) days prior to the election and a copy submitted to the council at the same time.

(d) *Appeals relative to removal of name from list.* Any community member whose name has been removed from a registered list by an election board, or whose name has been omitted in error but not added by the board, may appeal to the community secretary and the election board for listing at least three (3) days prior to the election. If the community secretary and the election board decide that the appellant is an eligible voter, they shall decide to which district he properly belongs and shall order the appellant's name placed upon the

registered list of that district. (Ord. No. SRO-58-79, 5-2-79; Amd. to Ord. No. SRO-32-75, § 1, 12-26-79)

Sec. 3-2. Candidates.

(a) *Eligibility.* Any person who qualifies under Article III, section 4 of the constitution and bylaws of the Salt River Pima-Maricopa Indian Community shall be eligible to be a candidate for councilman, president or vice-president.

(b) *Certain persons ineligible.* No person employed in the judicial or any other branch of government of the Salt River Pima-Maricopa Indian Community or employed by any branch of the federal government or employed as the manager of any business enterprise of the Salt River Pima-Maricopa Indian Community shall be eligible to hold office as councilman, president or vice-president.

(c) *Resignation of previous employment or office.* Any person otherwise qualified to hold office but ineligible under subsection (b) hereof, may become a candidate for such office and if elected, shall assume such office provided such person resigns from the employment or office described in subsection (b) hereof at least seventy-two (72) hours prior to the time established for assuming said elected office. (Amd. to Ord. No. SRO-32-75, § 2, 12-26-79).

EXHIBIT O

Sec. 5-40. Juries.

(a) *Right to jury in criminal cases.* Any person accused of any violation of this Code of the Salt River Pima-Maricopa Indian Community may demand a trial by jury.

(b) *Jury list to be prepared.* Within thirty (30) days prior to the first day of January of each calendar year, the community council shall cause a jury list to be prepared consisting of all of the members of the Salt River Pima-Maricopa Indian Community over the age of eighteen (18) years who are not judges of the community court, employees of the community court or employees of the Salt River Police Department. The list shall be presented to the community court when it is completed.

(c) *How constituted.* A jury shall consist of six (6) members of the Salt River Pima-Maricopa Indian Community, drawn from the jury list. The drawing will be by some disinterested person or persons appointed by the judge. A minimum of ten (10) names shall be drawn from which the selections will be made. Any party to the case may challenge not more than two (2) members of the panel so chosen, except for cause.

(d) *Cause for excusing a prospective juror.* The judge may excuse a prospective juror only if the prospective juror states that any circumstances of relationship or kinship with any of the parties will cause that juror to be biased as to any of the parties, or that a prospective juror's knowledge of facts in regard to the case to be presented will predispose the prospective juror to make a decision without regard to what is presented in the case, and the judge shall excuse a prospective juror in such circumstances only if the judge is satisfied that the juror's statement is true and correct.

(e) *Conduct of voir dire.* Only the judge shall question the prospective jurors in regard to their qualifications to serve on a jury. The parties or their attorneys or advocates may submit questions to the judge for such questioning and the judge may use such questions.

(f) *Verdict.* The judge shall instruct the jury in the law governing the case; and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing laws. In criminal cases, a unanimous jury vote is necessary for a verdict. In civil cases, a majority of four (4) of the six (6) jurors is necessary for a verdict.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 84-2107 PHX WPC

ALBERT DURO,
Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public Safety, *et al.*,
Respondents.

STIPULATION OF FACT

Petitioner and Respondents, by and through their respective attorneys, hereby stipulate to the existence of the following facts:

1. Albert Duro is a citizen of the United States. He was born in Riverside, California, on June 17, 1958, has lived all but one year of his life outside his tribal reservation, and considers himself to be a permanent resident of the State of California.

2. Albert Duro is a Cahulli Indian. He is an enrolled member of the Torrez-Martinez band of Mission Indians, a federally recognized band of American Indians.

3. Albert Duro is not a member of, nor is he eligible for membership in, the Salt River Pima-Maricopa Indian Community.

4. The Salt River Pima-Maricopa Indian Community is a federally recognized, self-governing Indian Community organized under the Indian Reorganization Act of 1934, with over 4,000 enrolled members all but 200 of whom live within the Community. Aside from two

enclaves of non-Indians living in a mobile home park at the edge of the Community and in a travel trailer park on a main road within the Community, the population of the Salt River Pima-Maricopa Indian Community consists of its enrolled members and other Indian people associated in the Community with them.

5. The Salt River Pima-Maricopa Indian Community maintains a Department of Public Safety and a court system. Edward Reina is the Chief of the Department of Public Safety and the Honorable Relman R. Manuel, Sr. is the Chief Judge.

6. On June 3, 1984 Albert Duro was arrested on alcohol and marijuana passession charges under the Salt River Pima-Maricopa Indian Community Code of Ordinances by the Salt River Pima-Maricopa Indian Community Police and, without counsel, entered a plea of guilty and was found guilty by the Salt River Pima-Maricopa Indian Community Court which sentenced him to pay a fine by Judge 15, 1984.

7. On or about the 19th day of June, 1984, Albert Duro was arrested near his home in the State of California by federal agents and charged with the murder of Phillip Fernando Brown, a member of the Gila River Indian Community (a different federally recognized Indian community) and a resident of the Victory Acres residential subdivision of the Salt River Pima-Maricopa Indian Community within the confines of the Salt River Pima-Maricopa Indian Community, by means of a firearm on or about June 15, 1984.

8. The indictment (Exhibit D to Petition) against Albert Duro was dismissed without prejudice on September 17, 1984.

9. On September 19, 1984, Mr. Duro was placed in the custody of the Salt River Department of Public Safety and continues to be held.

10. A criminal complaint against Albert Duro charging him with discharge of firearms was filed with the Salt River Pima-Maricopa Indian Community court, dated June 18, 1984 (C.R. 84-0256). The Salt River Pima-Maricopa Indian Community charges that Albert Duro "discharged at least two (2) shots from a lever action rifle in the Victory Acres Area I" of the reservation and that one of the shots killed a "14 year old boy." The criminal complaint and the federal indictment relate precisely to the same incident. The use or discharge of a firearm charged in both cases relates to the same act(s).

11. A "Motion to Dismiss" was filed with the Salt River Pima-Maricopa Indian Community Court in behalf of Albert Duro on October 4, 1984. The motion specifically argued that the Salt River Pima-Maricopa Indian Community Court did not have jurisdiction over Albert Duro, who is not a member of the Salt River Pima-Maricopa Indian Community. The Motion to Dismiss was denied and no other tribal remedies are available.

12. The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over any person otherwise subject to the jurisdiction of the Salt River Court.

13. From approximately March, 1984 until approximately June 15, 1984, Albert Duro lived within the Salt River Pima-Maricopa Indian Community with Debbie Lackey, a member of the Salt River Pima-Maricopa Indian Community, at her family home. Duro and Lackey have lived together, on an intermittent basis, in California from 1980 through 1983, except for 6 weeks they lived in Phoenix, Arizona. Lackey met Duro in California where she was born and lived during her childhood and part of her adult life.

14. Albert Duro worked for PiCopa Construction Company, a company owned by the Salt River Pima-Maricopa

Indian Community from February 1, 1984 to approximately June 15, 1984. Neither residency or membership within the Salt River Pima-Maricopa Indian Community was necessary for employment with PiCopa Construction Company.

15. A trial date is now set on the charge against Mr. Duro in the Salt River Pima-Maricopa Indian Community Court for December 3, 1984. Mr. Duro remains in custody at this time.

DATED this 19th day of November, 1984.

FREDERIC F. KAY
Federal Public Defender

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 84-2107 Phx. WPC

ALBERT DURO,

Petitioner,

vs.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety (of the Salt River Pima-Maricopa Indian Community); *et al.*,

Respondents.

MEMORANDUM AND ORDER

Petitioner, Albert Duro, is in the custody of the Salt River Department of Public Safety, an agency of the Salt River Pima-Maricopa Indian Community. He requests that this Court issue a writ of habeas corpus commanding his discharge from tribal custody and prohibiting any further criminal prosecution by the tribe. Jurisdiction is founded on 25 U.S.C. § 1303.

The following facts are not in dispute. Albert Duro, a Cahulli Indian, is a citizen of the United States. He has lived all but one year of his life outside his tribal reservation and considers himself to be a permanent resident of the State of California. Duro is an enrolled member of the Torrez-Martinez band of Mission Indians, a federally recognized tribe of American Indians. He is not a member of, nor eligible for membership in, the Salt River Pima-Maricopa Indian Community.

The Salt River Pima-Maricopa Indian Community is a federally recognized tribal entity organized under the Indian Reorganization Act of 1934. The tribal Constitution and Code provide for the maintenance of a Department of Public Safety and a court system. Edward Reina is the Chief of the Department of Public Safety and the Honorable Relman R. Manuel, Sr. is the Chief Judge.

From February 1, 1984 to approximately June 15, 1984, Duro resided in the Salt River Pima-Maricopa Indian Community and worked for PiCopa Construction Company, a tribally owned entity. Neither residency nor tribal membership is required for employment with PiCopa Construction Company.

On June 18, 1984, a criminal complaint was filed in the tribal court charging Duro with Discharge of Firearms in violation of § 6-131, Code of Misdemeanors of the Salt River Pima-Maricopa Indian Community. The complaint alleged that Duro discharged at least two shots from a lever action rifle on June 15, 1984, one of which fatally wounded Phillip Brown, a member of the Gila River Indian Community. The incident occurred within the boundaries of the Salt River Pima-Maricopa Indian Community.

On June 19, 1984, Duro was arrested by federal agents and charged with the murder of Phillip Brown. A grand jury indictment for first degree murder was returned on July 25, but was dismissed without prejudice on September 17. On September 19, Duro was transferred to the custody of the Salt River Department of Public Safety where he presently remains.

On October 4, 1984, Duro moved to dismiss the tribal action, arguing that the court could not lawfully assert criminal jurisdiction over a non-member of the tribe. The Honorable Manuel denied the motion to dismiss on October 19, and no further tribal remedies are available.

DISCUSSION

The Salt River Pima-Maricopa Indian Community formally asserts criminal jurisdiction over "any person

otherwise subject to the jurisdiction of the Salt River Court" who commits an offense enumerated in the tribal Code of Ordinances.[1] The Code expressly provides for criminal prosecution of any non-member offender.[2] It is undisputed, however, that the provisions are enforced only against Indians.[3] The issue before this Court is whether tribal assertion of criminal jurisdiction over non-member Indians is precluded by the equal protection and due process guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302(8).[4] For the reasons discussed below,

[1] The jurisdictional limits of the tribal court are set forth in the Constitution and Code of the Salt River Pima-Maricopa Indian Community. Article I, Sec. 4-1 of the Constitution provides:

(c) Criminal Jurisdiction Over Persons

(1) The court of the Salt River Pima-Maricopa Indian Community shall have jurisdiction over all offenses enumerated in the Code of Ordinances when committed by any person otherwise subject to the jurisdiction of the Salt River Court.

(2) Any person otherwise subject to the jurisdiction of the Salt River Court who enters upon the Salt River Pima-Maricopa Indian Community shall be deemed to have consented to the jurisdiction of the community court.

[2] Sec. 2-5. Removal of nonmember lawbreakers.

Any person not a member of the Salt River Pima-Maricopa Indian Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community . . . , and or may be turned over to the custody of the United States . . . or the State of Arizona for prosecution under federal or state law.

[3] Tribal enforcement of criminal provisions against non-Indians is precluded by *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011, 435 U.S. 134 (1978).

[4] Petitioners also base their claim for relief upon the equal protection and due process guarantees of the United States Constitution. These provisions are not applicable, however, to tribal governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 98 S.Ct. 1670 (1978).

this Court concludes that Indian tribes do not have criminal jurisdiction over non-members, regardless of their race.

Federal law has historically recognized Indian tribes as distinct political communities possessed with the inherent powers of sovereign nations, including the power to make substantive law and to enforce that law within their own forums. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675 (1978); *Worchester v. Georgia*, 6 Pet. 515, 559 (1832). Indian tribes are prohibited, however, from exercising those sovereign powers that are expressly terminated by Congress or "inconsistent with their status"[5] as dependent nations. *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011, 435 U.S. 134 (1978).

In *Oliphant*, the United States Supreme Court held that tribal courts do not have criminal jurisdiction over non-Indians. Although the petitioner in *Oliphant* was a non-Indian, the decision has been characterized as precluding tribal court criminal jurisdiction over non-members[6], and the Ninth Circuit appears to have implicitly adopted this interpretation.[7]

[5] For alternative, and apparently conflicting, formulations of this test see *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962-65 (9th Cir. 1982), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, contrasting *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 (1981) (divestiture of powers not needed for tribal self-government or internal control test), to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081 (1980) (divestiture of powers inimical to overriding federal interests test).

[6] *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 919, 455 U.S. 130, 171 (1982); *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587, 598 (9th Cir.), *cert. denied* 104 S.Ct. 1707 (1984); *U.S. v. Johnson*, 637 F.2d 1224 (9th Cir. 1980).

[7] In *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293 (1982), the Ninth Circuit held that *Oliphant* did not preclude the finding that tribal courts retained

Respondents argue that *Oliphant* is not controlling in the instant case because the precise issue of tribal court criminal jurisdiction over non-member Indians was not before the Court. This Court's holding, however, is not dependent upon acceptance of the broader interpretation of *Oliphant*.[8] The same result is mandated on equal protection grounds.[9]

The Indian Civil Rights Act, 25 U.S.C. § 1302, imposes certain restrictions upon tribal governments similar but

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civil regulatory jurisdictions over non-Indians. In support of this holding, the Court reasoned that:

> [t]o hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would, when combined with *Oliphant*, eliminate altogether any tribal jurisdiction over persons not members of the tribe . . . .

Id. at 366, quoted with approval in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 598 (9th Cir. 1983). *But see Williams v. Clark*, 742 F.2d 549 n.7 (9th Cir. 1984) (noting that whether a tribe could exercise criminal jurisdiction over non-members under any circumstances was an open question).

[8] Although the scope of tribal criminal jurisdiction over nonmembers was not before the Court, support for this broad interpretation of *Oliphant* can be found in *Montana v. United States*, 101 S.Ct. 1245, 450 U.S. 544 (1981), where the Court stated:

> "Though Oliphant only determined inherent tribal authority in criminal matters, . . . the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

Id., S.Ct. at 1258, U.S. at 565. *See also Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 920, 455 U.S. 130, 173-74 (1982) stating:

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "in this Nation each sovereign governs only with the consent of the governed." (citations omitted).

[9] For a detailed analysis of equal protection issues in Indian law, see K. Erhart, "Jurisdiction Over Nonmember Indians on Reservations", 1980 Ariz.St.L.J. 727.

not identical to those contained in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo*, *supra*, 436 U.S. at 57-58, 98 S.Ct. at 1676-77. In pertinent part the Act provides:

> No Indian tribe in exercising power of self-government shall (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

To withstand an equal protection challenge, differential treatment of persons must be justified by an adequate governmental interest. Traditionally differential treatment may be upheld if it bears a "rational relationship" to the achievement of a valid governmental objective. When the challenged treatment infringes upon a fundamental right or suspect classification such as race, however, the practice is subject to strict scrutiny and is valid only when necessary to achieve a compelling governmental interest.[10]

The discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards. Respondents

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[10] Racial classifications are generally analyzed under the strict scrutiny test. In regards to certain classifications establishing a preference for Indians over non-Indians, however, the Supreme Court has appeared to adopt the less stringent rational basis test. *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974) (upholding preferential treatment so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* U.S. at 555, S.Ct. at 2485). *See also United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395 (1977); *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943 (1976). The Court declined to apply the standard of strict scrutiny in these cases because the preferential treatment was accorded to "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Morton, supra* at 554. In contrast, the distinction utilized in the instant case is based solely upon race.

have failed to articulate any valid reason to justify the differential treatment of non-members solely on the basis of race. Non-member Indians have no greater right to involvement in tribal government than do non-Indians. Nor do they have a lesser fear of discrimination by a court system that equally precludes their participation.[11] Although the preclusion of tribal criminal jurisdiction over non-member Indians will necessarily reduce tribal authority to allow retention of jurisdiction over non-member Indians when similarly situated non-Indians are exempt from such enforcement.

IT IS ORDERED:

The relief requested is granted, and counsel for petitioner will promptly lodge with the Court a form of judgment consistent with the foregoing and approved as to form a counsel for respondents.

DATED January 8, 1985.

/s/ [Illegible]
United States District Judge

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[11] Without separate evidence of an equal protection or due process violation, mere denial of participation in the political or judicial systems is insufficient grounds for the invalidation of tribal jurisdiction over nonmembers. *See United States v. Mazurie*, 419 U.S. 544, 577, 95 S.Ct. 710, 718 (1975); accord, *Confederated Salish*, *supra* at 964 n.31.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 84-2107-PHX-WPC

ALBERT DURO,
Petitioner,

-vs-

EDWARD REINA, Chief of Police Salt River Department of Public Safety (of the Salt River Pima-Maricopa Indian Community); and the HONORABLE RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,
Respondents.

JUDGMENT

Filed January 15, 1985

A verified petition for writ of habeas corpus having been filed on behalf of the petitioner, Albert Duro, a hearing having been held thereon and both parties having submitted additional memorandum of argument; and on due deliberation, this Court has filed its memorandum and order on January 8, 1985.

The Court adopts and reaffirms the findings of fact and conclusions of law found, concluded, and adjudged in and by its memorandum and order given and filed herein on January 8, 1985.

It is ORDERED and ADJUDGED that the relief requested in the verified petition is granted and the

respondents are ordered forthwith to unconditionally discharge petitioner from their custody.

DATED this 14th day of Jan, 1985.

/s/ [Illegible]
Judge

The Judgment has been reviewed
and approved as to form by counsel
for respondents.

Dated this 14 day of January, 1985.

/s/ Richard B. Wilks
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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,
v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, *et al.*,
Respondents-Appellants.

Argued and Submitted Oct. 8, 1985
Decided July 9, 1987

Appeal from the United States District Court
for the District of Arizona

Sneed, Circuit Judge, dissented and filed opinion.

Before CHOY, SNEED, and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further

criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I.

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding

and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and removed him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the tribal court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from that judgment.

II.

STANDARD OF REVIEW

Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); *see Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III.

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving question of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011,

55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them. The Court's opinion explicitly refers only to non-Indians. However, some subsequent opinions describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173, 102 S.Ct. 894, 920, 71 L.Ed.2d 21 (1982); *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978). Other opinions describe *Oliphant*'s holding as limited to non-Indians. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.[1] The holdings of the cases cited do not depend on

[1] A similar inconsistency pervades the opinions of this court. *Compare, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) *with, e.g., United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir. 1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for opinions are internally inconsistent on this point. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n.9, 598 (9th Cir. 1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. *See Williams v. Clark*, 742 F.2d 549,

making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. On the one hand, there are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). On the other hand, both executive and congressional pronouncements appar-

555 n.7 (9th Cir. 1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

ently used the word "Indian" to mean "tribal member." implying that non-Indians and nonmembers have the same status. *See* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.[2] *Id.* at 206, 208, 98 S.Ct. 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over non-member Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401 (a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim to which we next turn. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

B. *Equal Protection*

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil

[2] Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

Rights Act, 25 U.S.C. § 1302.[3] The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. *Racial classification*

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[4] *United States v. Antelope*, 430 U.S.

[3] The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After* Santa Clara Pueblo v. Martinez, 62 Denv. L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

[4] This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. *See supra* note 3. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federally recognized Indian tribes, which are political rather than racial groups. *See Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct 2474, 2484, n. 24, 41 L.Ed.2d 1290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X.* 565 F.2d 585, 594 (9th Cir.1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be

treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Commuity through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that this is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. *Rational basis*

The Community wishes to extend the tribal court's criminal jurisdiction to non-member Indians in order better to enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S.3092 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State,*

and Tribal Jurisdiction 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015-16 (1981) (critcizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, —— U.S. ——, 107 S.Ct. 971, 976, 94L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. *A Jurisdictional Void*

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both he treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.[5] *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

[5] Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. *See United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. *See* Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (citicizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the trial court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, dissenting:

I respectfully dissent. *Oliphant* should govern this case. Two commentators recently have concluded that, for purposes of determining the criminal jurisdiction of tribal courts, *Oliphant* and the history of relevant treaties and statutes suggest that nonmember Indians and non-Indians be treated the same. Clinton, *Isloated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L. Rev. 979, 1022 n. 251 (1981); *see* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz. St.L.J. 727, 737-49. The Supreme Court made this conclusion explicit in *United States v. Wheeler*, 435 U.S. 313, 322, 324, 326-27, 328, 98 S.Ct. 1079, 1085, 1086, 1087-88, 1088, 55 L.Ed.2d 303 (1978), by its emphasis

of tribal sovereignty as the source of the tribe's criminal jurisdiction over its *members*.

Independently of these authorities, the equal protection clause of the Indian Civil Rights Act requires affirmance of the district court. To embrace the differential treatment of non-Indians and nonmember Indians within the context of this case is to employ a classification based upon race. It is true that special treatment of Indians in many situations has not been treated as being based on race but rather on the unique sovereignty of Indian Tribes. *See United States v. Antelope*, 430 U.S. 641, 645-47, 97 S.Ct. 1395, 1398-99, 51 L.E.2d 701 (1977). That sovereignty provides no proper basis for depriving a nonmember Indian of an immunity from tribal jurisdiction enjoyed by a non-Indian. Neither does the fact that the determination of who is an Indian sometimes involves factors other than race.

Laws based on racial classifications are subject to strict scrutiny. Extending tribal court criminal jurisdiction to nonmember Indians might incrementally aid law enforcement on reservations. But then so might its extension to non-Indians. However, clearly these extensions are not necessary to achieve a compelling governmental interest. Therefore, it fails the applicable equal protection test.

Different tribes do things differently. Indian laws traditionally respects the tribes' individuality. *See* Clinton, *supra*, at 984-91. Limiting a tribal court's criminal jurisdiction to members of its own tribe is quite consistent with the self-determination of Indian tribes. To bar its extension to nonmember Indians does not significantly impair tribal self-determination.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,
v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al.,
Respondents-Appellants.

Argued and Submitted Oct. 8, 1985

Decided July 9, 1987

As Amended June 29, 1988

Appeal from the United States District Court
for the District of Arizona

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe

properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

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On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C.

§§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and moved him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the trial court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from the judgment.

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III

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional liability upon Indians not members of the tribe whose jurisdiction is in question.

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[1] In a recent decision, *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988), the Eighth Circuit concluded that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe.

The Eighth Circuit acknowledged that the Supreme Court in *Oliphant* held that the Suquamish Tribal Court lacked authority to exercise criminal jurisdiction over non-Indians and that Congress had not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians. *Greywater* acknowledges that 18 U.S.C. § 1152 may seem to indicate that Congress' use of the term "Indian" was meant to include all Indians regardless of tribal affiliation and while acknowledging the sovereign power of tribes to punish offenses against tribal law by members of a tribe found that federal preemption of a tribe's jurisdiction to punish its members for infraction of tribal law would detract substantially from tribal self-government. However, the Eighth Circuit ultimately found that the Devils Lake Sioux Tribe's exercise of criminal jurisdiction over nonmember Indians is beyond what is necessary to protect the rights essential to the tribe's self-government and is inconsistent with the overriding interest of the federal government in ensuring that its citizens are protected from unwarranted intrusions upon their personal liberty. For the reasons expressed in this amended opinion, we do not find the Eighth Circuit's reasoning persuasive.

pose a mining severance tax on *non-Indians* who were mining on the reservation. The majority opinion on occasion, and for no apparent reason, uses the term "nonmember" when discussing the power of the tribe to tax "non-Indians." *Id.*, 102 S.Ct. at 903-5. This change in terms has no relevance to the decision. It is clear that the Court is discussing the tribe's authority to tax "non-Indian" miners not "nonmembers."

Justice Stevens' dissent in addressing the authority of the tribe to tax the non-Indian lessees who produce oil and gas from within the tribe's reservation in dicta miscasts *Oliphant* as holding that tribes "have no criminal jurisdiction over crimes committed by nonmembers within the reservation." *Id.* at 919. In his analysis of the power of the tribe to tax, Justice Stevens interchanges the terms "nonmember" and "non-Indian." The majority rejected his analysis that the power of an Indian tribe to exclude nonmembers was the basis for imposing a tax on the nonmembers, *Id.* at 903, 919, 920.

In *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978), Justice Stewart in dictum stated that *Oliphant* stands for the proposition that nonmembers cannot be tried in tribal courts. The term "nonmember" was used throughout the *Wheeler* opinion, however, nonmember status was not in issue as Wheeler was a member of the Navajo tribe, who was tried by the Navajo trial court for a Navajo tribal code violation. At issue was not the jurisdiction of tribal courts but the possible double jeopardy effect of a prior tribal court conviction in a federal rape prosecution. The indiscriminate use of the term "nonmember" throughout the *Wheeler* opinion, 435 U.S. at 322-28, 98 S.Ct. at 1085-89, amplifies the point that Justice Stewart's statement is merely dictum. To the contrary two other Supreme Court opinions describe *Oliphant's* holding as limited to non-Indians. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985) (tribal court power to exercise civil subject matter jurisdiction over non-Indians); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).[2]

It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.[3] The holdings

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[2] A review of several of the authorities cited in the *Oliphant* opinion fortifies the point that its application is limited to the lack of tribal court criminal jurisdiction over non-Indians not nonmember Indians. E.g. *Ex Parte Kenyon*, 14 F.Cas. 353 (W.D.Ark. 1878) ("[p]etitioner was born of white parents, had left his domicile in the Indian county and gained domicile in the state of Kansas."); 2 Op.Atty.Gen. 693 (1834) (Attorney General concludes that the Choctaw tribal courts have no jurisdiction over white citizens nor over Negro slaves owned by white citizens.); *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113 (1970) (Solicitor General of the Department of Interior concludes that Indian tribes do not possess criminal jurisdiction over non-Indians).

[3] A similar inconsistency pervades the opinions of this court. *Compare, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) *with, e.g., United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir. 1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably non nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir. 1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. *See Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir. 1984)

of the cases cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the liberal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. There are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24

(whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

L.Ed.2d 494 (1970)). One commentator has implied that non-Indians and nonmembers have the same status. The implication was derived from an analysis of statutes that allow states to assume criminal and civil jurisdiction over Indian country with the consent of the tribe occupying the particular Indian country. 25 U.S.C. §§ 1321, 1322 and 1326. We do not agree with that implication.[4]

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argu-

[4] *See* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

The comment only postulates that nonmember Indians and non-Indians be treated the same. The comment acknowledges that changes in Indian treaty provisions in the 18th and early 19th centuries make Congress' intent uncertain on the issue of federal versus tribal criminal jurisdiction. These langauge changes might indicate, the comment suggests:

> "[T]hat Congress meants to assume federal jurisdiction over offenses between nonmember Indians and tribal members in the same manner it had previously assumed federal jurisdiction over offenses between non-Indians and tribal members. *On the other hand Congress* may have intended the change of language to merely reflect the applicability of a treaty to only the signatory tribes." *Id.* at 738 (emphasis added).

At the same time the comment proposes that by examining treaty provisions, the intent of Congress to assume jurisdiction over nonmember Indians is made clear. Yet later the author, examining federal statutes (25 U.S.C. §§ 1321, 1322 and 1326) states that Indian and nonmember Indians can only be implicitly equated.

The problems is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area. Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations.

As for *Oliphant*, the comment acknowledged several times that it is limited to non-Indians.

ment was the core of the Court's opinion.[5] *Id.* at 206, 208, 98 S.Ct. at 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over nonmember Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim which we address later. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

Rather, what is more dispositive of this case is the federal criminal statutory scheme[6] and its treatment of crimes committed by Indians. 18 U.S.C. § 1151, et seq.

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[5] Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490-99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540-51. The third argument is not vulnerable to these attacks, which further enhances its importance.

[6] In addition to the statutory scheme, the regulatory scheme promulgated by the Department of Interior's Bureau of Indian Affairs establishing Courts of Indian Offenses states that those courts "shall have jurisdiction over all offenses . . . when committed by *any* Indian, within the reservation or reservations for which the court is established . . ." 25 C.F.R. § 11.2(a) (1987) (emphasis added). We find it instructive that the regulations fail to limit jurisdiction of these courts only to offenses committed by Indians of the tribe for which the particular court is established. (The regulations deem an Indian for purposes of these courts "to be *any* person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 25 C.F.R. § 11.2(c) (1987). There is no distinction made as to the status of nonmember Indians.)

That statutory scheme subjects individuals to federal prosecution "by virtue of their status as Indians." *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977). For purposes of the federal criminal statutes the important inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in *United States v. Heath*, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. §§ 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation. The reason was the absence of a federal relationship between the Klamaths and the United States as a result of the termination of federal supervision over the Klamath Tribe by the Klamath Termination Act; 25 U.S.C. § 564 et seq. *Id.* at 19. Under 18 U.S.C. § 1153 jurisdiction is based upon a crime committed by one Indian against another Indian within the Indian country. It was not suggested that federal jurisdiction was lacking because the Klamath was on the reservation of the Warm Springs Tribe, where she enjoyed no tribal relationship.

Granted, the discussion so far has been concerned with federal jurisdiction and not tribal. However, it cannot be ignored that the two are interwoven. Thus in *Arizona ex rel Merrill v. Turtle*, *supra*, we held that Navajo tribal sovereignty precluded Arizona from arresting a Cheyenne Indian on the Navajo Reservation for the purpose of extraditing him to Oklahoma. We recognized by analyzing the terms of the Treaty of 1868 between the Navajos and the United States that a tribe has the right to exercise power over the Indian residents of its reservation, without distinction as to whether the Indian was a member of the tribe or not. *Id.* at 686.

The structure of criminal jurisdiction in Indian country, as far as it relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to *that or some other tribe* . . . [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886) (emphasis added). The statute has *never* been restricted in its application to Indians who are members of the "host" tribe.

Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under 18 U.S.C. § 1152. That statute makes applicable in Indian country those criminal laws applicable in areas of exclusive federal jurisdiction with several exceptions.[7]

As 18 U.S.C. § 1152 has been applied it has also been assumed that references to "Indian" meant any Indian not just Indians who were members of the host tribe. In *United States v. Burland*, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971) we applied the statute to a member of the Confederated Salish and Kootenai Tribes who committed a crime on the Flathead Reservation. We noted, citing *Kagama*, *supra*, that Burland did not argue "that the statute was in-

[7] The statute does not apply to offenses committed by one Indian against the person or property of another Indian, nor to an Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

applicable to him because he was a member of a tribe other than the local tribe and was visiting from another reservation." *Id.* at 1200, n. 1.

Furthermore, in discussing the Major Crimes Act, we held in *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980) that except for the crimes specifically enumerated in the Act, "the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country." *Id.* at 1231. Again we declined to make a distinction between member and nonmember Indians.

The cases discussing the federal criminal statutory scheme clearly indicated that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.

B. *Equal Protection*

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.[8] The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifi-

[8] The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv.L.Rev. 761, 773-75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

cations ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. *Racial classification*

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[9] *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federal recognized Indian tribes, which are political rather than racial groups. *See Morton v. Mancari*, 417 U.S. 535, 553, n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are

[9] This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. *See supra* note 8. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associ-

ated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that his is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. *Rational basis*

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order to better enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs,* 98 Cong., 2d Sess, 21, 27-28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37-39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra,* at 39-40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 Stan.L.Rev. 979, 1015-16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant,* the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 976, 94 L.Ed. 2d 10 (1987); *Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959).

We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. *A Jurisdictional Void*

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians. Thus only a state court could have jurisdiction over Duro.[10] *See* D. Getches, D. Rosenfelt & C. Wilkinson,

[10] Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. *See United States v. John,* 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians

Cases and Materials on Federal Indian Law 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. *See* Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445-46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

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against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands; A Journey Through a Jurisdictional Maze*, 18 Ariz. L.Rev. 503, 524-26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by assuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, Dissenting:

The majority has substantially revised its opinion since it first appeared at 821 F.2d 1358-64 (9th Cir.1987). It is, therefore, appropriate that my dissent be revised, particularly in light of the fact that the intervening deliberations have provided to me additional insights that have strengthened my resolve to dissent.

In my original dissent, I stated "*Oliphant* should govern this case." *Id.* at 1364. That remains true, but now I am more ready to concede that it need not. The underpinning of its holding was the history of the relationship between the United States and Indian tribes generally and the Suquamish Tribe in particular. Emphasis was placed upon the fact that the tribes seldom, if ever, exercised criminal jurisdiction over non-Indians prior to the middle of this century. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97, 98 S.Ct. 1011, 1014-15, 55 L.Ed.2d 209 (1978). The same undoubtedly cannot be said with respect to the exercise of criminal jurisdiction over Indians not members of the adjudicating tribe. Therefore, I conclude that the *ratio decidendi* of *Oliphant* is not applicable to this case.

Nonetheless, *Oliphant* exists. Its holding that neither the existing residual tribal sovereignty nor a grant of power by Congress authorized the exercise of criminal jurisdiction by a tribe over a non-Indian leaves open the question whether either supports the exercise of such jurisdiction over a nonmember Indian. I believe neither does. My reasons, succinctly stated, are as follows:

(1) *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), makes clear that retained

tribal sovereignty exists to govern the behavior of tribal members. No necessity exists to expand its reach.

(2) No federal statute explicitly grants to tribal authorities the power to exercise criminal jurisdiction over nonmembers. 18 U.S.C. § 1152 does not exclude such a grant but it does not require it. Nor does existing case law require it.

(3) To subject nonmember Indians to tribal jurisdiction discriminates against the nonmember both actually and potentially. This discrimination is not justifiable.

I now shall address each of these positions in greater depth.

I.

RETAINED TRIBAL SOVEREIGNTY

To understand the scope of *United States v. Wheeler, supra*, it is helpful to point out that both *Oliphant v. Suquamish Indian Tribe, supra*, and *Wheeler* originated in this circuit and that each constituted a reversal of this circuit's prior decision. In *Oliphant*, this circuit extended criminal tribal jurisdiction to non-Indians, while in *Wheeler* it made any conviction by a tribal court of any crime over which it had jurisdiction a bar to prosecution by the United States of the greater offense of which the tribally prosecuted lesser included offense was a part. The circuit court in *Wheeler* undoubtedly was influenced by the expansion of tribal authority recognized by *Oliphant*. To reach its result in *Wheeler*, this court reasoned that the United States and the Navajo Tribe should not be treated as dual sovereigns for double jeopardy purposes.

It was this proposition against which much of the Supreme Court's opinion in *Wheeler* is directed. It must be remembered that the Court no doubt considered *Wheeler* and *Oliphant* contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided *Oliphant* by rejecting the expansion of the authority of tribal courts over

crimes by non-Indians, it would not have been surprising to have found the Court in *Wheeler* using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in *Wheeler*. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its *members*. Two examples of this focus are as follows:

> Moreover, the sovereign power of a tribe to prosecute its *members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers* of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 [94 S.Ct. 772, 777-778]; *Johnson v. M'Intosh*, 8 Wheat. 543, 574 [5 L.Ed. 681]. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559 [8 L.Ed 483]; *Cherokee Nation v. Georgia*, 5 Pet., at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147 [3 L.Ed. 162] (Johnson, J., concurring). And, as we have recently held, they cannot try *nonmembers* in tribal courts. *Oliphant v. Suquamish Indian Tribe, ante*, [435 U.S.] p. 191 [98 S.Ct. p. 1011].

435 U.S. at 326, 98 S.Ct. at 1087 (emphasis added).

In sum, the power to punish offenses against tribal law committed by Tribe *members*, which was part of

> the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. at 1088 (emphasis added) (footnotes omitted). Others appear in the margin.[1]

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[1] It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people with the power of regulating their internal and social relations." *United States v. Kagama, supra,* 118 U.S. at 381-382, 6 S.Ct. at 1112-1113; *Cherokee Nation v. Georgia,* 5 Pet. 1, 16, 80 L.Ed. 25. Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions. *United States v. Antelope,* 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395, 1397 n. 2; *Talton v. Mayes,* 163 U.S. 376, 380, 16 S.Ct. 986, 988, 41 L.Ed. 196; *Ex parte Crow Dog,* 109 U.S. 556, 571-572, 3 S.Ct. 396, 405-406, 27 L.Ed. 1030 (1883); see 18 U.S.C. § 1152 (1976 ed.), *infra,* n. 21.

435 U.S. at 322, 98 S.Ct. at 1085 (emphasis added) (footnote omitted).

> The Indian tribes are "distinct political communities" with their own mores and laws, *Worcester v. Georgia,* 6 Pet., at 557; *The Kansas Indians,* 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their *members* and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. *See Ex parte Crow Dog,* 109 U.S. at 571 [3 S.Ct. at 405].
>
> Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its *members* for infractions of tribal law would detract substantially from tribal self-government, just

The lesson to be drawn appears to me to be clear. Retained tribal sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate. The upshot is that the majority wishes to enhance slightly tribal powers while I do not.

II.

DO FEDERAL STATUTES GRANT TO TRIBES POWER TO IMPOSE CRIMINAL PUNISHMENT ON NONMEMBER INDIANS?

The majority devotes substantial space to arguing that federal statutes have given tribal courts the power to subject nonmember Indians to its criminal jurisdiction. *See* pp. 12-16 [Brunetti draft]. It asserts that certain cases have assumed that such jurisdiction exists and that "the structure of criminal jurisdiction in Indian country," p. 14[B.d.], also suggests that this is true.

I shall address each case cited by the majority. Only a portion of a sentence appearing in *United States v. Antelope,* 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977), was quoted by the majority, apparently to make the point that federal criminal statutes focus on "Indians" without the qualified "tribal member" on "non-tribal member." The full sentence is:

> The question presented by our grant of certiorari is whether, under the circumstances of this case, fed-

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> as federal preemption of state criminal jurisdiction would trench upon important state interests.

Id. at 331-32, 98 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

eral criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

The "circumstances of this case" were that members of the Coeur d'Alene tribe murdered a non-Indian in the Coeur d'Alene reservation and sought to be tried under Idaho law rather than federal law pursuant to the Major Crimes Act, 18 U.S.C. § 1153. The Court rejected the defendants' constitutional argument. It was not necessary to address whether any distinction between members of the Coeur d'Alene tribe and nonmembers existed. To have said each time the word "Indians" was used, "including both members and nonmembers," would have been absurd. The case simply is not relevant to the issue before us.

The majority itself recognized the marginal significance of *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974), to the issue before us. I would go further and assert that it has no relevance whatsoever. The issues before the court in *Heath* were whether the United States could indict an Indian of a terminated tribe under the Major Crimes Act, 18 U.S.C. § 1153,[2] and, if not, whether the attempt to do so was prejudicial error when the crime charged was murder, as defined in 18 U.S.C. § 1111, and

[2] 18 U.S.C. § 1153 reads in relevant part as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

committed in "Indian country" and, thus, subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. § 1152.[3] This court held that the defendant, as an Indian of a terminated tribe, must be treated as any other non-Indian citizen of the state. As a result, 18 U.S.C. § 1153 could not provide a basis for federal jurisdiction. It applies, this court held, only when the "Indian who commits [certain crimes] against the person or property of another Indian or other person," § 1153, is an Indian as to whom the United States has a "special responsibility." *Heath*, 509 F.2d at 19. A person, who happens to be an Indian and was once a member of a now terminated tribe, could have been indicted, as could have been any other person, under 18 U.S.C. § 1152. The court concluded that under these circumstances the indictment under 18 U.S.C. § 1153 was not prejudicial error.

The issue of tribal court jurisdiction over a nonmember Indian was irrelevant to the question that *Heath* raised. Had the *Heath* court believed that the tribal court had criminal jurisdiction over a nonmember it would have affected neither its reasoning nor its result. The crucial issue, as seen by *Heath*, was whether the United States had a "special responsibility" with regard to the defendant, not whether the defendant was a member of the victim's tribe. The majority says it did not occur

[3] Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

11 U.S.C. § 1152.

to the *Heath* court to suggest "that federal jurisdiction is lacking because the Klamath [the defendant Indian] was on the reservation of the Warm Springs Tribe, where he enjoyed no tribal relationship." [B draft p. 3] Of course, it did not. It was irrelevant. To overlook an issue that could have been controlling is significant; to refrain from addressing one that is irrelevant only mercifully saves both the reader's eyes and time.

The majority's use of *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970), is a bit closer to the mark at which it is shooting. Unfortunately, a miss is a miss, however. This court, in holding that the Navajo Tribe need not accede to Arizona's effort to extradite a Cheyenne Indian resident on their reservation to the State of Oklahoma, emphasized the retained sovereignty of the Tribe. We pointed to the Treaty of 1868, the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the codification of the Navajo Tribe's extradition responsibilities in its Tribal Code, and the approval of that Code by the Commissioner of Indian Affairs. None of those sources of law required the Tribe to accede to Arizona's request. Indeed, the Tribal Code expressly precluded any such accession.

The case, therefore, is consistent with the existence of substantial retained sovereignty and for the purposes of the case treated members and nonmembers the same. This similarity of treatment was rooted in the 1868 Treaty that spoke of "bad men among the Indians," who committed wrongs against anyone "subject to the authority of the United States," a group that undoubtedly includes, from time to time, whites as well as nonmember Indians. But it goes no further. It simply does not address the jurisdiction of the Navajo Tribe to subject nonmembers to criminal prosecution. If one repeats "tribal sovereignty" over and over again, the hypnotic power of the

phrase may lead one to conclude that such jurisdiction in a given situation exists. Reasoning, not self-hypnosis, is the way of the law, however.

Enough has been said to suggest that neither 18 U.S.C. § 1152 nor 18 U.S.C. § 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

The Federal Enclaves Act, 18 U.S.C. § 1152, also does not unequivocally support the majority. Its principal purpose is to extend to "Indian country" the general laws of the United States. The reach of those laws within "Indian country" clearly is unaffected by whether the offender is an Indian or a non-Indian. *See Mull v. United States*, 402 F.2d 571, 573 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107, 89 S.Ct. 917, 21 L.Ed.2d 804 (1969). On its face, 18 U.S.C. § 1152 also would appear not to draw a distinction between a victim who is Indian and one who is not. However, it has been long established that the statute does not embrace an offense by a non-Indian against a non-Indian even when committed in Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 869, 26 L.Ed. 869 (1882); *see New York ex rel. Ray v. Martin*, 326 U.S. 496, 500, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Mull v. United States*, 402 F.2d at 573.

An offense by an Indian against a non-Indian, on the other hand, is within the statute. *See United States v. Burland*, 441 F.2d 1199, 1203 (9th Cir.), *cert. dened*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971). And it is true, as *Burland* holds, that the Indian offender need not have committed his crime within the reservation

limits of the tribe of which he is a member. *Cf. United States v. Kagama*, 118 U.S. 375, 382, 6 S.Ct. 1109, 1113, 30 L.Ed. 228, 231 (1885). All that is necessary is that it have been committed in "Indian country."

The position of the majority emerges in its most forceful form when the focus is fixed upon the exceptions to 18 U.S.C. § 1152. These are (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," and (3) any offense where by treaty exclusive jurisdiction "is or may be secured to the Indian tribes respectively." Only the first would be affected by taking *Wheeler* at its word and rejecting the position of the majority. In essence, the majority argues that because there is no explicit provision for relieving the nonmember Indian from tribal jurisdiction in the first exception, he must be subject to the tribe's criminal jurisdiction. It buttresses this by pointing out, as already indicated, that 18 U.S.C. § 1152 is applicable generally without regard to whether the offender was a member of the Tribe on whose reservation the offense was committed. Thus, tribal membership, it argues, also should be irrelevant in applying the excepiton.

The conclusion does not follow. To disregard membership in construing the broad reach of 18 U.S.C. § 1152 *protects* Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to *enhance* the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist. Finally, there is no more reason to treat the literal language of the statute as all encompassing than there was in the case of the non-Indian offense against the non-Indian. *See McBratney*, 104 U.S. 869, *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307.

I acknowledge that the exclusion of nonmember Indians from the jurisdiction of tribal courts will impose somewhat greater responsibilities on certain United States Attorneys.[4] Nonmember offenses not directed at another Indian, and not described in the Major Crimes Act, 11 U.S.C. § 1153, must be prosecuted by these officials. This category embraces such things as drunk and disorderly conduct.

The majority also suggests that state prosecutors and state courts may become involved in law enforcement. This concern appears to be premised on the assumption that an offense by a nonmember Indian against another Indian, which is not a major crime, would not be covered by 18 U.S.C. § 1152 were my view to prevail. Thus, the majority suggests state law enforcement would be required to fill the gap.

I suggest the majority has misread 18 U.S.C. § 1152. To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility," Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently. To the extent the offense each commits is not proscribed by federal law, the Assimilative Crimes Act, 18 U.S.C. § 13, will import the applicable state law to be applied by federal authorities and courts.

The fear of the majority can be put this way. As they see it, an offense which is not a major one by an Indian against an Indian is excluded from federal jurisdiction

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[4] And possibly on state prosecutors if, as has been suggested by some, "victimless" crimes by non-Indians (and nonmember Indians by the reasoning of the dissent) fall within the exclusive jurisdiction of state courts. *See* 3 Op. Off. Legal Counsel 111 (1979).

when tribal jurisdiction is lacking because the offender is a nonmember. I suggest that under those circumstances the offense "escapes" the first exception to the general rule of 18 U.S.C. § 1152 but does not "escape" the broad reach of 18 U.S.C. § 1152. That is, the offense remains an offense by an Indian within Indian country and thus subject to the general laws of the United States, but, for the reason stated here, should not be considered as one committed by one Indian against another within the meaning of the first exception to 18 U.S.C. § 1152. Put more simply, the nonmember Indian should be treated as a non-Indian.

III.

DISCRIMINATION AGAINST THE NONMEMBER INDIAN

In my original dissent, I lumped all the discriminatory possibilities to which the majority subjected the nonmember Indian under the heading of equal protection. The majority in its original and revised opinion addresses the equal protection issue and concludes that there is a rational basis for subjecting the nonmember to tribal jurisdiction and that, in any event, in this case Duro is not being discriminated against on the basis of race.

On reflection, I have concluded that it is not essential to my position to fit the facts of this case to the analytics of the equal protection doctrines. Rather, I have employed the discriminatory possibilities this case suggests to inform my interpretation of the applicable statutes and cases. These possibilities may, but need not, rise to the level of equal protection violations. Their existence suggests, however, that wise construction of the applicable law should reduce, if not eliminate, their existence.

The heart of the issue this case presents, as this dissent already has stated, is that the majority puts the offending nonmember Indian in a position different from, and

less advantageous than, that of any other class of offender. The member Indian offender is "among his own," which presumably is frequently to his benefit. The non-Indian is protected by *Oliphant*, *supra*, from possibly harsh treatment by a tribal court animated by a bias against all non-Indians. And the Indian no longer enjoying the "special relationship" with the federal government enjoys the same protection as does the non-Indian. Only the nonmember Indian still enjoying that "special relationship" must be subject to a tribunal that, on its face, suggests the possibility of prejudice against him.

It is not beyond the pale of proper judicial behavior to employ an interpretation of the law that eliminates this possibility. In the final analysis, the majority has suggested only two rather weak reasons for not doing so, *viz.*, to enhance tribal sovereignty and to avoid burdening U.S. Attorneys and their staffs. Inasmuch as the contribution to these ends made by the majority's approach is only marginal at best, I would hold that the price demanded for these modest achievements is too high. Tribes would lose no meaningful sovereignty under my analysis nor would U.S. Attorneys become overburdened.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-1718

ALBERT DURO,
Petitioner-Appellee,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, *et al.*,
Respondents-Appellants.

Nov. 2, 1988

Appeal from the United States District Court
for the District of Arizona

Before CHOY, SNEED, and BRUNETTI, Circuit Judges.

ORDER

Judge Choy and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends accepting the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. Fed.R.App.P. 35(b). A majority of the judges voted against en banc consideration. Judge Kozinski's dissent from the order denying rehearing en banc is attached.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom LEAVY and TROTT, Circuit Judges, join, dissenting from the order denying rehearing en banc.

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir.1988), a panel of our court has cast off the map and the compass. The panel's holding—that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe—overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals. This is a serious matter deserving serious attention. I therefore respectfully dissent from the order denying rehearing en banc.

I

Petitioner Albert Duro is a member of the Torrez-Martinez band of Mission Indians. From March 1984 to June 1984, Duro lived on the Salt River Indian Reservation, the home of the Salt River Pima-Maricopa Indian Community, a tribe in which Duro is ineligible for membership. While on the Salt River Reservation, Duro allegedly shot and killed a fourteen year old boy. Criminal complaints against Duro were filed in both federal district court and the Salt River Pima-Maricopa Indian Community Court.

The panel holds that the tribal court has criminal jurisdiction over Duro, a member of a wholly different tribe, simply because he is an Indian. As discussed more

fully below, this one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided.

II

A. *Disregard of Supreme Court Authority*

The panel laments the lack of Supreme Court guidance on the question before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1152. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labeling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has charted a clear course through these waters, a course that the Eighth Circuit had no difficulty following. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988).

The course starts with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the Court held that tribes could not exercise criminal jurisdiction over non-Indians.[1] Standing alone, *Oliphant* leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians

[1] The panel correctly notes that *Oliphant* has been widely criticized. 851 F.2d at 1142, n.5. *See* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1987 Wis.L.Rev. 219, 267-74; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479 (1979); Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 Minn.L.Rev. 609 (1979). Yet *Oliphant* remains law and continues to be, at least in the Supreme Court's view, the progenitor of a series of tribal jurisdiction decisions. The panel may well be right in joining the chorus, 851 F.2d at 1141-42, but the academic criticism, no matter how strong, cannot overrule a decision of the Supreme Court.

who are not members of the forum tribe. A series of subsequent decisions have elaborated on *Oliphant*, however, effectively foreclosing this possibility.

Only two weeks after *Oliphant* the Court decided *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978). *Wheeler* raised the question whether the defendant (a member of the Navajo tribe) could be tried in federal court after the Navajo tribal court had convicted him of the same conduct. To resolve this question, the Supreme Court had to examine the source of the tribe's authority over Wheeler.[2] The Court concluded that the jurisdiction derived from the tribe's retained authority, i.e., that aspect of the tribe's sovereignty it had not given up by virtue of incorporation into the United States. In reaching this conclusion, the Court drew a sharp distinction between those sovereign powers the tribe had surrendered and those it had not:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* . . . . But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among mem-

[2] The source of the authority was crucial for double jeopardy purposes: If the tribe derived its authority from Congress, the defendant would face double jeopardy because both prosecutions would be on behalf of the same sovereign. *See Puerto Rico v. Shell Co.*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937) (double jeopardy clause bars successive prosecutions by federal and territorial courts because they are "creations emanating from the same sovereignty"); *Waller v. Florida*, 397 U.S. 387, 393, 90 S.Ct. 1184, 1187, 25 L.Ed.2d 435 (1970) (barring successive prosecutions by a city and by the state of which the city is a political subdivision). If the sources were different (as in the case of separate state and federal prosecutions), then the double jeopardy clause would not bar subsequent prosecution by the United States. *See Wheeler*, 435 U.S. at 329-30, 98 S.Ct. at 1089-90.

> bers of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326, 98 S.Ct. at 1087 (emphasis added). Speaking precisely to the issue presented in our case, the Court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts." *Id.* (citing *Oliphant*, 435 U.S. at 191, 98 S.Ct. at 1011).

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort: It is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. More important, when cited by the Court in support of its only characterization of *Oliphant* that makes sense. As the Eighth Circuit recognized, "[t]he *Wheeler* Court's analysis distinguishing nonmember Indians from tribal members was not inadvertent. Its very analysis requires such distinction." *Greywater*, 846 F.2d at 491. If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*.[3]

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[3] The majority minimizes *Wheeler* by describing its use of the term "nonmember" as "indiscriminate." 851 F.2d at 1140. The fact that the Court refers to both nonmembers and non-Indians in some of its opinions does not, however, reveal sloppy thinking or the random use of language. When the Court merely describes the facts presented by *Oliphant* or other cases, it usually employs the term non-Indian. *See, e.g., Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). When it discusses its *rationale*, the Court repeatedly distinguishes along the line of tribal membership and not race. *See, e.g., Montana*, 450 U.S. at 563-64, 101 S.Ct. at 1257-58; *Colville*, 447 U.S. at 155-61, 100 S.Ct. at 2082-85.

But *Oliphant* and *Wheeler* were only the first manifestations of the Court's emerging theory limiting tribal jurisdiction to members of the tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court considered whether a state could impose various taxes on cigarettes and other items sold by tribal enterprises on the reservation. The Court held that the state could properly tax sales to nonmembers of the tribe, but not sales to members. Most important, the Court addressed the issue—crucial in our case—of the status of the Indians who were not members of the tribe in question:

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.
>
> Nor would the imposition of Washington's tax on these purchases contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. *For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.* There is no evidence that non-members have a say in tribal affairs or significantly share in tribal disbursements.

Id. at 161 100 S.Ct. at 2085 (emphasis added); *see also id.* at 187, 100 S.Ct. at 2098 (Rehnquist, J., concurring in part) ("[t]he fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share"). Although the Court was discussing a tribe's immunity from taxation, not its criminal juris-

diction, the Court was clearly drawing on a broader theory of tribal sovereignty: A tribe acts as a sovereign only with respect to its own members.

The panel disregards *Colville*, just as it disregards *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), where the Court provided its most explicit statement yet as to the boundaries of tribal sovereignty. *Montana* draws a clear distinction between a tribe's power over its own members and its power over nonmembers. At issue was whether a tribe could prohibit hunting and fishing by nonmembers on reservation land not owned by the tribe. Applying the principles announced in *Wheeler*, the Court concluded that the tribe could not prohibit such activities:

> Thus, *in addition to the power to punish tribal offenders*, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*

Id. at 564, 101 S.Ct. at 1257 (emphasis added; citations omitted). Significantly, the Court viewed its conclusion as flowing from the rationale of *Oliphant:* "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.*" *Id.* at 565, 101 S.Ct. at 1258 (emphasis added; footnote omitted). The exercise of criminal jurisdiction is plainly an "inherent sovereign power."

As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.[4]

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[4] The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. The states already exercise exclusive jurisdiction over similar offenses (both violent and victimless) committed on the reservation involving solely non-Indian defendants and victims. *See* F. Cohen, *Handbook of Federal Indian Law* 352-53 & n.47 (1982 ed.). The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. Any such disparate treatment would violate the equal protection clause of the fourteenth amendment, subjecting state officials to liability under 42 U.S.C. § 1983 (1982). *See Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (state officials liable under section 1983 where they know or should know that their conduct violates a clearly established constitutional right); *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973) (per curiam) (law enforcement officers may be liable under section 1983 for failure to enforce the law equally and fairly); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to

B. *Equal Protection*

Another very troubling aspect of the panel's opinion is its handling of Duro's equal protection claim. Duro argues that, by asserting jurisdiction over Indians but not over non-Indians, the tribe has violated the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8) (1982 & Supp. IV 1986). While a distinction based solely on tribal membership could be sustained on a rational basis alone, Duro contends that the distinction in this case is based on race and does not survive strict scrutiny. The panel rejects this argument and, in doing so, makes two fundamental errors. First, the majority relies on cases holding that *Congress* need not have a compelling governmental interest in enacting statutes that discriminate between Indians and non-Indians in order to survive an equal protection challenge. *See United States v. Antelope*, 430 U.S. 641, 97 S.Ct.

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single out Indians in ways "that might otherwise be constitutionally offensive"). The panel cites no support for its proposition.

The far more plausible assumption is that states would exercise their jurisdiction fully and responsibly. Non-Indian residents of reservations apparently outnumber nonmember Indian residents by a substantial margin. Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc at 9-10; *see Greywater*, 846 F.2d at 493. The states would therefore experience only a marginal increase in law enforcement responsibilities on the reservation. Moreover, some tribes already restrict their own criminal jurisdiction to tribal members. *See, e.g., Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 & n.4 (9th Cir. 1976) (declining to rule on whether the tribe has inherent power to assert criminal jurisdiction over nonmembers because tribal constitution permits criminal jurisdiction only over members); Cohen, *supra* note 5, at 357 n.77 ("[o]ther tribes have laws restricting tribal jurisdiction to members"). Presumably some authority steps into fill the jurisdictional void created in such cases; the states are a logical choice. *See id.* at 357 n.79 ("[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader"); *Greywater*, 846 F.2d at 490 n.3 ("Petitioners were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident.").

1395, 51 L.Ed.2d 701 (1977) (federal jurisdiction over Indian defendants under Major Crimes Act, 18 U.S.C. § 1153); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (Bureau of Indian Affairs employment preference for enrolled Indians). These cases are inapposite where there is no congressional pronouncement on the issue and the tribe is exercising its retained sovereignty. Second, the panel holds that the classification in question is not racial at all because race is merely one of several factors that go into drawing the distinction at issue. This holding cannot be squared with established principles of equal protection.

The considerations that led the Court to uphold congressional Indian/non-Indian distinctions are irrelevant where, as here, Congress has not acted. The Constitution has been interpreted as granting Congress "plenary power . . . to deal with the special problems of Indians." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483; *see Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398; U.S. Const. art. I, § 8. Moreover, congressional enactments affording special treatment to Indian tribes and their members are based on a long "history of treaties and the assumption of a 'guardian-ward status." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483. Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians" . . .'" *Antelope*, 430 U.S. at 646, 97 S.Ct. at 1399 (quoting *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24); *see also Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484 (BIA preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party).

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books. *Mancari*, 417 U.S. at 552, 94 S.Ct. at 2483; *see id.* at 555, 94 S.Ct at 2485 (permitting special treatment of Indians so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

On the other hand, the Court has never held that a *tribe* may exercise its authority in a racially discriminatory manner. As the Court held in *Wheeler*, Indian tribes derive their power to conduct criminal trials not from Congress but from their own retained sovereignty. The two are quite different. Indian tribes may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The panel's holding that they may is without precedent or authority.

More disturbing still, the panel holds that the distinction based on Indian status is not a racial classification because factors other than race are taken into account. 851 F.2d at 1144. While this may be true when the distinction is made by *Congress*, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one

of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 562-63, 50 L.Ed.2d 450 (1977). Either race was considered in the decision in which case strict scrutiny is invoked, or race was not considered, in which case the rational basis standard applies. You can't have it both ways. In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. *See id.* (racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny); *see also* L. Tribe, *American Constitutional Law* § 16-14, at 1472 (2d ed. 1988) ("any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny . . . ."). Under strict scrutinny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong.[5]

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[5] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) suggested that, because tribes are sovereigns pre-existing the Constitution, they may be exempt from constitutional provisions (such as the fifth and fourteenth amendments) limiting the power of federal and state authorities. The equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), however, extends to any person within a tribe's jurisdiction. While ICRA's equal protection clause may not be coextensive with the constitutional equal protection clause, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir. 1976); *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir. 1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n.9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

C. *Potential for Biased Tribunals*

There is yet another troubling aspect of the opinion: its failure to address or even consider the possibility that it may be subjecting Duro to adjudication by a biased tribunal. Judge Sneed, in dissent, gave the subject thoughtful attention. 851 F.2d at 1151-52 (Sneed, J., dissenting). The *Greywater* panel thought the matter significant enough to merit discussion:

> As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These non-member Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant:* they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Greywater, 846 F.2d at 493. The *Duro* majority ignores the subject.

Indian tribes differ in material respects from political entities to which we are accustomed. They have broad authority to determine the qualifications for membership, which often are based on degree of tribal blood. Cohen, *supra* note 5, at 20-23. To be eligible for membership in the Salt River Pima-Maricopa Indian Community, a person must not be a member of another tribe. Salt River Pima-Marcipoa Community Const. art. II, § 1; Salt River Pima-Maricopa Community Code § 2-1(a) (Supp. No. 2). As noted, Duro is thus ineligible for membership in the community which will decide his fate. The exclusion of otherwise eligible individuals who belong to another tribe underscores the possibility that those who do not qualify for tribal membership may be treated in an unfair or discriminatory fashion. Indeed, the possibility

that there may be hostility or mistrust between Indian tribes is not a far-fetched concern. As reported in testimony given recently before the Civil Rights Commission, at least one such situation currently exists, giving rise to what many perceive as miscarriages of justice:

> I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute. . . .
>
> It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court. . . . It is my personal experience that these individuals have experienced a violation of their . . . right to trial by impartial jury. . . .
>
> . . . .
>
> I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.
>
> . . . .
>
> . . . Hopi Tribal members who sit on those juries —given the history of the land dispute, there is no way that they can leave that corridor of the court-

> room and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land. . . . [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed. . . .

Enforcement of the Indian Civil Rights Act: Hearings Before the United States Commission on Civil Rights (Aug. 13-14, 1987) at 219-20 (testimony of Lee Brook Phillips, attorney).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

III

Despite warnings from Judge Sneed's powerful and persuasive dissent, despite the unanimous decision of another circuit, the court today stands by a panel opinion that simply does not do justice to the sensitive and important issues presented to us. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 88-6546

ALBERT DURO,
Petitioner,
v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed April 24, 1989

ON CONSIDERATION of the motion for leave to proceed herein forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 24, 1989